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2713 No. 13119

United States
Court of Appeals
For the Ninth Circuit.

PEOPLE OF THE STATE OF CALIFORNIA
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN AS-
SOCIATION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JAN - 1 1952



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

EDMUND G. BROWN,
Attorney General;
WALTER L. BOWERS,
Assistant Attorney General;
BAYARD RHONE,
Deputy Attorney General,
600 State Bldg.,
Los Angeles 12, Calif.

For Appellee:

FRANK P. DOHERTY,
433 S. Spring St.,
Los Angeles, Calif.
CRAIL and CRAIL,
315 West Ninth St.,
Los Angeles 15, Calif.

For Amicus Curiae:

ERNEST A. TOLIN,
United States Attorney;
CLYDE C. DOWNING,
REUBEN ROSENSWEIG,
Assistants U. S. Attorney,
600 U. S. Post Office & Court House
Bldg., Los Angeles 12, Calif.



In the District Court of the United States for the
Southern District of California, Central Division

No. 10528-C.

PEOPLE OF THE STATE OF CALIFORNIA
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of California,

Plaintiffs,

vs.

COAST FEDERAL SAVINGS AND LOAN
ASSOCIATION, a Corporation,

Defendant.

PETITION FOR REMOVAL OF CIVIL
ACTION

Petition for Removal of Civil Action from the
Superior Court of the County of Los Angeles
in the State of California to the District Court
of the United States for the Southern District
of California, Central Division.

To the Honorable Judge of Said District Court of
the United States:

Your petitioner, Coast Federal Savings and Loan
Association of Los Angeles, the defendant above
named, respectfully shows:

1. That a civil action has been brought and is
now pending in the Superior Court of Los Angeles
County, in the State of California, a state court,
wherein People Of The State Of [2*] California

* Page numbering appearing at foot of page of original Reporter's
Transcript of Record.

and Maurice C. Sparling, as Superintendent of Banks of the State of California, are plaintiffs and your petitioner, Coast Federal Savings and Loan Association of Los Angeles, a corporation, is defendant, which action is designated by general No. 566395 and is hereinafter sometimes referred to as "said action No. 566395."

2. That said action No. 566395 is a civil action of which the district courts of the United States have original jurisdiction, and that the said action is one for an injunction and for penalties.

3. That petitioner hereby petitions to remove said action No. 566395 to this court upon the grounds and for the reasons that said suit is one arising under the Constitution and Laws of the United States, in that it involves the application of Article I, Section 8 of the Constitution of the United States and the "Home Owners' Loan Act of 1933," 12 USCA Sec. 1464, for the reason that plaintiffs allege in Paragraphs II and III of Count One, in Paragraphs II and III of Count Two, in Paragraphs II and III of Count Three, in Paragraphs II and III of Count Four, and in Paragraphs II and III of Count Five of their Complaint that the defendant Coast Federal Savings and Loan Association of Los Angeles is, and was at all times mentioned therein, a savings and loan association, organized under the provisions of 12 U. S. Code Annotated, 1464; and that defendant does not have, and has not had at any time mentioned therein, any authority, right or

permit from, by or under the United States of America to engage in or to transact a banking business or to solicit, receive or accept money on deposit as a regular business, or at all; and that defendant does not have, and has not had at any time mentioned therein, any authority, right or permit from, by or under the United States of America to advertise, make use of and circulate a circular or paper known as "Coast Federal's Challenger," having [3] thereon words indicating that the business of said defendant is the business of a bank or savings bank, and in particular having thereon the words

"Place Your Savings at Coast Federal . . .

"For . . . Safety, with federal insurance up to \$5,000 per account;

"For . . . Higher Return on Your Savings; 3% per annum is the current rate;

"For . . . Convenience, and friendly service;

"For . . . Availability—you can get your money when you want it.

"Accounts Opened by the 10th of the Month Earn from the 1st,"

and the words

"Your Savings Account Opened by the 10th of the Month, Earns Interest from the 1st! Whee!";

and the words

"Open Your Coast Federal Savings Account Now! Coast Federal Savings and Loan Association";

and that defendant does not have, and has not had at any time mentioned therein, any authority, right or permit from, by or under the United States of America to solicit and receive deposits and transact business in the way and the manner of a bank and savings bank and in such a way and a manner as to lead the public to believe that its business was and is that of a bank and savings bank contrary to the provisions of and in violation of the Bank Act of the State of California, and particularly sections 12 and 12a thereof, and contrary to the provisions and in violation of Chapter 18, Article 3 of the Banking Code of the State of California, and to, on each and every such day, contrary to the said provisions of said Bank Act and of said Banking Code, in its advertisements and advertising refer to its office and place of business as "banking office" and use and emphasize in such [4] advertising and advertisements the word "bank," and to advertise, publicize, adopt and transact business under and by means and with the words "our business is banking," "our banking is business," and "we solicit your banking business," and other similar words and phrases, and generally represent, indicate and hold itself out as a "bank" and lead the public to believe that the defendant was and is a bank and doing a banking business and a savings bank business; and that defendant does not have, and has not had at any time mentioned therein, any authority, right or permit from, by or under the United States of America to do each and all of the acts and things aforesaid and to use

the words in violation of Chapter 18, Article 3 of the Banking Code and to transact business in violation of such Code and in such a way and in such a manner as to lead the public to believe that defendant's business is that of a bank or of a savings bank; and basing, in part, their right to the relief sought, on the above allegations, plaintiffs seek to enjoin petitioner from accepting deposits and doing certain acts which plaintiffs allege constitute transacting a banking business.

4. That the matter in controversy in said action No. 566395 at the commencement of said action and at the present time exceeds the sum or value of \$3,000, exclusive of interest and costs.

5. That said action No. 566395 was commenced on the twenty-fourth of October, 1949, and process therein was served on petitioner's attorneys on the twenty-fifth of October, 1949.

6. Your petitioner herewith presents a good and sufficient bond, as provided by the statute, conditioned that your petitioner, the defendant, will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, petitioner prays that the said action No. 566395 may be removable from said state court into this court [5] for trial and determination; that this court accept said bond and make and enter an order of removal of said action No. 566395; and

that a writ of certiorari in this behalf, for the record and proceedings heretofore had in said action No. 566395 in said state court, and in particular the exhibits attached to the Complaint therein, may issue from this court to the said Superior Court of the State of California in and for the County of Los Angeles.

Dated November 3, 1949.

COAST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF LOS ANGELES

By /s/ J. E. HOLADAY,
Vice-President.

CRAIL AND CRAIL,

By /s/ HARRY G. McMAHON,
An Associate of the Firm.

State of California,
County of Los Angeles—ss.

J. E. Holaday, being sworn, says: That he is the vice-president of Coast Federal Savings and Loan Association of Los Angeles, a corporation, the above-named petitioner, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Petition for Removal of Civil Action and knows the contents thereof; that the same [6] is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

/s/ J. E. HOLADAY.

Subscribed and sworn to before me on November 3, 1949.

[Seal] /s/ R. M. BLANELY,
Notary Public in and for
Said County and State. [7]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 566395

PEOPLE OF THE STATE OF CALIFORNIA
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of California,

Plaintiff,

vs.

COAST FEDERAL SAVINGS AND LOAN
ASSOCIATION, a Corporation,

Defendant.

Action Brought in the Superior Court of the
County of Los Angeles, and Complaint Filed
in the Office of the Clerk of the Superior Court
of Said County.

SUMMONS

The People of the State of California Send Greet-
ings to:

Coast Federal Savings and Loan Association, a
corporation, Defendant.

You are directed to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 24th day of October, 1949.

[Seal] HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of
the State of California, in and for the County
of Los Angeles.

By K. MEACHEM,
Deputy.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk. [8]

In the Superior Court of the State of California,
in and for the County of Los Angeles

PEOPLE OF THE STATE OF CALIFORNIA
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of California,
Plaintiffs,

vs.

COAST FEDERAL SAVINGS AND LOAN
ASSOCIATION, a Corporation,
Defendant.

COMPLAINT FOR INJUNCTION TO RE-
STRAIN VIOLATION OF STATE BANK-
ING CODE, AND FOR PENALTIES

Plaintiffs allege.

Count One

I.

That plaintiff Maurice C. Sparling is, and was
at all times mentioned herein, the duly appointed,
qualified, and acting Superintendent of Banks of
the State of California.

II.

That the defendant Coast Federal Savings and
Loan Association is, and was at all times mentioned
herein, a corporation, organized under the provi-
sions of 12 U. S. Code Annotated, 1464, and having
its principal place of business in Los Angeles
County, California. [9]

III.

That defendant is, and was at all times mentioned herein, a savings and loan association, organized as alleged herein; that defendant is not, and was not at any time mentioned herein, a "bank" as defined in the Bank Act of the State of California (Act 652, Deering's General Laws), nor as defined in the Banking Code (Ch. 755, Stat. 1949); that defendant does not have, and has not had at any time mentioned herein, any certificate from the Superintendent of Banks of the State of California, and does not have, and has not had at any time mentioned herein, any authority, right or permit from, by or under the State of California or the United States of America to engage in or to transact a banking business or to solicit, receive or accept money on deposit as a regular business, or at all.

IV.

That on or about November 1, 1948, and on each and every day thereafter up to on or about March 1, 1949, defendant, contrary to and in violation of the said Bank Act, and particularly sections 12 and 12a thereof, made use of an office sign and signs at the place where defendant's business is transacted in Los Angeles, California, having thereon words indicating that such place or office is the place or office of a bank and having thereon the words "bank" and "savings," and having such words lettered on its said place of business in Los Angeles, California, as more particularly appears from Exhibit "A" attached hereto, hereby referred

to and made a part hereof; that each and all of the foregoing acts and things were done and performed by defendant in such a way and in such a manner as to lead, and for the purpose and with the intent of leading, and that the same did lead, the public to believe [10] that defendant's business was and is that of a bank and of a savings bank and that defendant was at all of said times engaged in and transacting a banking business.

V.

That at all times herein mentioned said Bank Act provided that any corporation violating any provision of sections 12 or 12a thereof shall forfeit to the State of California \$100.00 a day for every day during which such violation continues; that the violations aforesaid continued each and every day from November 1, 1948, to on or about March 1, 1949, both inclusive, and that defendant thereby forfeited and became liable to said State for the sum of \$100.00 for each and every one of such days.

Count Two

A.

Plaintiffs hereby refer to, incorporate, and reallege paragraphs I, II and III of Count One hereof and make the same and each and every allegation contained therein a part of this Count Two, as paragraphs I, II, and III, respectively thereof, the same as if specifically set forth at length herein.

IV.

That on each and every month, and on each and every day beginning November 1, 1948, up to and including the commencement of this action, contrary to the provisions and in violation of the said Bank Act, and particularly sections 12 and 12a thereof, and contrary to the provisions of said Banking Code, and particularly section 3391 thereof, defendant has [11] made use of and circulated a circular or paper known as "Coast Federal's Challenger," having thereon words indicating that the business of said defendant is the business of a bank or savings bank, and in particular having thereon the words

"Place Your Savings at Coast Federal . . .

"For . . . Safety, with federal insurance up to \$5,000 per account;

"For . . . Higher Return on Your Savings; 3% per annum is the current rate;

"For . . . Convenience, and friendly service;

"For . . . Availability—you can get your money when you want it.

"Accounts Opened by the 10th of the Month Earn from the 1st,"

and the words

"Your Savings Account Opened by the 10th of the Month, Earns Interest from the 1st! Whee!",

and the words

"Open Your Coast Federal Savings Account

Now! Coast Federal Savings and Loan Association”;

and other similar words and phrases; that each and all of the aforesaid acts and things were done and performed by defendant in such a way and in such a manner as to lead, and for the purpose and with the intent of leading, and that the same did lead, the public to believe that defendant's business was and is that of a bank and of a savings bank and that defendant was at all said times and is authorized and empowered to engage in and to transact a banking business.

V.

That at all times herein mentioned, to and including September 30, 1949, said Bank Act provided that any corporation violating any provision of sections 12 or 12a thereof, shall [12] forfeit to the State of California \$100.00 a day for each and every day during which such violation continues; that on and ever since October 1, 1949, said Banking Code, and section 3395 thereof, provide that any person violating any provision of the foregoing sections of that article, including section 3391 thereof, shall be liable to the people of the State of California in the amount of \$100.00 a day during which such violation continues; that the violations aforesaid continued from November 1, 1948, to and including the time of filing this action, and that defendant thereby forfeited and became liable to said State for the sum of \$100.00 for each and every one of such days.

Count Three

A.

Plaintiffs hereby refer to, incorporate, and re-allege paragraphs I, II and III of Count One hereof and make the same and each and every allegation contained therein a part of this Count Three, as paragraphs I, II, and III, respectively thereof, the same as if specifically set forth at length herein.

IV.

That on November 1, 1948, and on each and every day thereafter up to and including the commencement of this action, defendant solicited and received deposits and transacted business in the way and the manner of a bank and savings bank and in such a way and a manner as to lead the public to believe that its business was and is that of a bank and savings bank contrary to the provisions of and in violation of said Bank Act, and particularly sections 12 and 12a thereof and contrary to [13] the provisions and violation of Chapter 18, Article 3 of said Banking Code; that on each and every such day defendant contrary to the said provisions of said Bank Act and of said Banking Code, in its advertisements and advertising referred to its office and place of business as "banking office" and used and emphasized in such advertising and advertisements the word "bank," and advertised, publicized, adopted and transacted business under and by means and with the words "our business is banking," "our banking is business," and "we solicit your banking business," and other similar words

and phrases, and generally represented, indicated and held itself out as a "bank" and lead the public to believe that the defendant was and is a bank and doing a banking business and a savings bank business.

V.

Plaintiffs hereby refer to, incorporate, and reallege paragraph V of Count Two hereof and make the same and each and every allegation contained therein a part of this Count Three, as paragraph V thereof, the same as if specifically set forth at length herein.

Count Four

A.

Plaintiffs hereby refer to, incorporate, and reallege paragraphs I, II and III of Count One hereof and make the same and each and every allegation contained therein a part of this Count Four, as paragraphs I, II and III, respectively thereof, the same as if specifically set forth at length herein. [14]

IV.

That said section-12 of the said Bank Act further provides:

" . . . that any building and loan association having in its corporate name words not clearly indicating the nature of its business shall, on all signs, letterheads, and advertising matter, state: 'This is a Building and Loan Association,' or words to that effect . . . and . . . no such association shall advertise or hold itself out to the public as a savings bank.";

that section 3392 of said Banking Code provides in part, as follows, to wit:

“Any building and loan association or savings and loan association having in its corporate name words not clearly indicating the nature of its business shall state, on all signs, letterheads, and advertising matter, ‘This is a Building and Loan Association,’ or ‘This is a Savings and Loan Association,’ or words to that effect.”;

that on or about November 1, 1948, and on each and every day thereafter up to the date of filing this complaint, the defendant violated, and is now continuing to violate, the said provisions of said Bank Act, and of said Banking Code, in that it has continuously advertised and referred to itself as “Coast Federal Savings,” without using the balance of its corporate name, and without appending to its advertising matter any words to the effect that it is a Savings and Loan Association, or otherwise, and by reason of the matters and things herein stated the defendant has since November 1, 1948, and now is, advertising, and holding itself out to the public [15] as a bank, and as a savings bank, and has and is advertising in such a way as to lead, and mislead, the public to believe that its business is that of a bank.

V.

Plaintiffs hereby refer to, incorporate, and re-allege paragraph V of Count Two hereof and make the same and each and every allegation contained therein a part of this Count Four, as paragraph

V thereof, the same as if specifically set forth at length herein.

Count Five

A.

Plaintiffs hereby refer to, incorporate, and re-allege paragraphs I, II, and III of Count One, paragraph IV of Count Two, paragraph IV of Count Three, and paragraph IV of Count Four hereof, and make the same and each and every allegation contained therein a part of this Count Five, as paragraphs I, II, III, IV, IVa, and IVb, respectively thereof, the same as if specifically set forth at length herein.

V.

That defendant has done, is doing, threatens to continue doing, and will, unless enjoined and restrained by this court, continue to do, each and all of acts and things aforesaid and to use the words in violation of Chapter 18, Article 3 of the Banking Code and to transact business in violation of such Code and in such a way and in such a manner as to lead the public to believe that defendant's business is that of a bank or of a savings bank. [16]

Wherefore, plaintiffs pray

1. That plaintiffs have judgment against defendant for the sum of \$100.00 per day for each and every violation set forth in Counts One, Two, Three, and Four hereof for each and every day such violations continue from and including November 1,

1948, to and including the date of entry of judgment herein;

2. That defendant, and its officers, agents, servants, employees, and all other persons acting for and on behalf of defendant, be permanently restrained and enjoined from

(a) Using any sign or signs, or lettering on or at defendant's office or place of business having thereon the word "bank" or the word "savings," unless such latter word is used in and as part of defendant's full name, or any other word or words indicating that defendant's office or place of business is a bank or a savings bank or that defendant is authorized or empowered to engage in or transact a banking business;

(b) Using or circulating the "Coast Federal's Challenger," or any other magazine, circular or paper having thereon or therein any of the words set forth within quotations in paragraph IV of Count Two herein, or any other word or words indicating that the business of defendant is that of a bank or savings bank;

(c) Soliciting or receiving deposits or transacting business in the way and manner of a bank or savings bank, or in such a way or manner as to lead the public to believe that defendant's business is that of a bank or savings bank;

(d) Using in any advertisements or adver-

tising [17] matter any reference to defendant's office or place of business as a "bank" or "savings bank" or "banking office," or advertising, publicizing, or in any other way stating or making reference that "our business is banking" or "our banking is business" or "we solicit your banking business," or using in any way any other similar words and phrases representing, indicating, or in any manner inferring that the defendant is a "bank" or a "savings bank," or leading the public to believe that defendant is doing a banking business or is in any manner authorized or empowered to act as a "bank" or to transact any banking business.

3. That plaintiffs have judgment against defendant for their costs incurred herein; and for such other and further relief as to the court shall seem proper.

FRED N. HOWSER,

Attorney General of the State
of California.

/s/ WALTER L. BOWERS,

Assistant Attorney General.

/s/ BAYARD RHONE,

Deputy Attorney General,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco—ss.

Maurice C. Sparling, being by me first duly sworn, deposes and says: That he is the Superintendent of Banks of the State of California, one of the plaintiffs in the foregoing and above-entitled action; that he has read the foregoing Complaint (for Injunction to Restrain Violation of State Banking Code, and for Penalties) and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ MAURICE C. SPARLING.

Subscribed and sworn to before me, this 20th day of October, 1949.

[Seal] AGNES M. COLE,
Notary Public in and for Said State of California,
City and County of San Francisco.

My commission expires August 28, 1951.

[Endorsed]: Filed November 3, 1949. [19]

[Title of District Court and Cause.]

NOTICE OF PETITION FOR REMOVAL
OF CIVIL ACTION

To People of the State of California and Maurice C. Sparling, as Superintendent of Banks of the State of California, Plaintiffs; and Fred N. Howser, Attorney General of the State of California; Walter L. Bowers, Assistant Attorney General, and Bayard Rhone, Deputy Attorney General, Their Attorneys:

Please Take Notice, that the defendant in the above-entitled action on November 3, 1949, filed in the District Court of the United States for the Southern District of California (Central Division) a Petition for Removal of the said action from the Superior Court of the State of California in and for the County of Los Angeles to said District.

Dated November 3, 1949.

CRAIL AND CRAIL,

By /s/ HARRY G. McMAHON,
Attorneys for Defendant.

Affidavit of Service attached.

[Endorsed]: Filed November 9, 1949. [20]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR INJUNCTION
TO RESTRAIN VIOLATION OF STATE
BANKING CODE AND FOR PENALTIES

Comes now the defendant, Coast Federal Savings and Loan Association of Los Angeles, and for answer to the complaint filed herein alleges and denies as follows:

Answer to Count One of Complaint

First Defense

I.

Count One of said complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

I.

Answering paragraph III of Count One of said complaint, [23] defendant admits that it is and was at all times mentioned therein a savings and loan association organized under the provisions of 12 U. S. Code, Section 1464; defendant admits that it does not have, and has not had at any time mentioned in said complaint, any certificate from the Superintendent of Banks of the State of California, but defendant alleges it does not need any such certificate and that defendant is not subject to the jurisdiction of the plaintiffs, or either of them.

Except as herein expressly admitted, defendant denies each and every allegation contained in said paragraph.

II.

Answering paragraph IV of Count One of said complaint, defendant admits that between the dates therein alleged, it made use of signs having thereon the words "bank" and "savings" as appears in Exhibit "A" of said complaint, but defendant alleges that at any time either of said words were used it was used in conjunction with other words and as part of a phrase, such as "Member Federal Home Loan Bank," "Coast Federal Savings," "Coast Federal Savings and Loan Association," and "Coast Federal Savings and Loan Association of Los Angeles."

Except as herein expressly admitted, defendant denies each and every allegation in said paragraph.

III.

Answering paragraph V of Count One of said complaint, defendant denies each and every allegation of fact contained therein, but neither admits nor denies the conclusions of law contained therein.

Third Defense

Defendant is an instrumentality of the United States Government, and all of such acts as were done by defendant were done by virtue of and under the authority of the government of the [24] United States.

Fourth Defense

The laws and regulations of the government of the United States provide for administrative remedies and procedures for alleged violations of

law by federal savings and loan associations. Said remedies and procedures have not been resorted to by the plaintiffs, nor exhausted by them.

Fifth Defense

By custom and usage in the financial business, financial institutions do not usually use their full corporate name on signs, in advertising and advertisements, in transacting business or to indicate the nature of their business.

Sixth Defense

Any and all acts, advertising and advertisements of defendant are permitted by the Laws of the United States, by the Rules and Regulations of the Federal Home Loan Bank Board, an agency of the United States, and by the Federal Savings and Insurance Corporation, an agency of the United States.

Seventh Defense

The public has not been misled by Coast Federal Savings and Loan Association of Los Angeles.

Answer to Count Two of Complaint

First Defense

Count Two of the said complaint fails to state a claim against defendant upon which relief can be granted. [25]

Second Defense

I.

Answering paragraph III of Count Two of said complaint, defendant admits that it is and was at all times mentioned therein a savings and loan association organized under the provisions of 12 U. S. Code, Section 1464; defendant admits that it does not have, and has not had at any time mentioned in said complaint, any certificate from the Superintendent of Banks of the State of California, but defendant alleges it does not need any such certificate and that defendant is not subject to the jurisdiction of the plaintiffs, or either of them.

Except as herein expressly admitted, defendant denies each and every allegation contained in said paragraph.

II.

Answering paragraph IV of Count Two, defendant admits that it has circulated a paper known as "Coast Federal's Challenger." Defendant admits that in the October, 1949, issue of said paper there appeared the words set out on lines 5 through 19 on page four of said complaint. Defendant admits that some of said words have appeared in other issues of said paper.

Except as herein expressly admitted, defendant denies each and every allegation in said paragraph.

III.

Answering paragraph V of Count Two, defendant denies each and every allegation of fact contained therein, but neither admits nor denies the conclusions of law contained therein.

Third Defense

Defendant is an instrumentality of the United States Government, and all of such acts as were done by defendant were done by virtue of and under the authority of the government of the United States. [26]

Fourth Defense

The laws and regulations of the government of the United States provide for administrative remedies and procedures for alleged violations of law by federal savings and loan associations. Said remedies and procedures have not been resorted to by the plaintiffs, nor exhausted by them.

Fifth Defense

By custom and usage in the financial business, financial institutions do not usually use their full corporate name on signs, in advertising and advertisements, in transacting business or to indicate the nature of their business.

Sixth Defense

Any and all acts, advertising and advertisements of defendant are permitted by the Laws of the United States, by the Rules and Regulations of the Federal Home Loan Bank Board, an agency of the United States, and by the Federal Savings and Insurance Corporation, an agency of the United States.

Seventh Defense

The public has not been misled by Coast Federal Savings and Loan Association of Los Angeles.

Answer to Count Three of Complaint

First Defense

Count Three of the said complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

I.

Answering paragraph III of Count Three of said complaint, [27] defendant admits that it is and was at all times mentioned therein a savings and loan association organized under the provisions of 12 U. S. Code, Section 1464; defendant admits that it does not have, and has not had at any time mentioned in said complaint, any certificate from the Superintendent of Banks of the State of California, but defendant alleges it does not need any such certificate and that defendant is not subject to the jurisdiction of the plaintiffs, or either of them.

Except as herein expressly admitted, defendant denies each and every allegation contained in said paragraph.

II.

Answering paragraph IV of Count Three of said complaint, defendant admits that on page four of the October, 1949, issue of the "Challenger" in

a column entitled “ ‘Why I Hate Your Singing Commercial’ Winners . . .,” there appeared the following excerpt of a letter received by defendant:

“Mrs. Mable E. Smith, who made the constructive suggestion of a dignified slogan such as: ‘Our Business is Banking. Our Banking Is Business. We solicit your banking business.’ ”,

as shown by Exhibit “A” attached hereto.

Defendant denies each and every allegation contained in said paragraph, except as herein expressly admitted.

III.

Answering paragraph V of Count Three of said complaint, defendant denies each and every allegation of fact contained therein, but neither admits nor denies the conclusions of law contained therein.

Third Defense

Defendant is an instrumentality of the United States [28] Government, and all of such acts as were done by defendant were done by virtue of and under the authority of the government of the United States.

Fourth Defense

The laws and regulations of the government of the United States provide for administrative remedies and procedures for alleged violations of law by federal savings and loan associations. Said remedies and procedures have not been resorted to by the plaintiffs, nor exhausted by them.

Fifth Defense

By custom and usage in the financial business, financial institutions do not usually use their full corporate name on signs, in advertising and advertisements, in transacting business or to indicate the nature of their business.

Sixth Defense

Any and all acts, advertising and advertisements of defendant are permitted by the laws of the United States, by the Rules and Regulations of the Federal Home Loan Bank Board, an agency of the United States, and by the Federal Savings and Insurance Corporation, an agency of the United States.

Seventh Defense

The public has not been misled by Coast Federal Savings and Loan Association of Los Angeles.

Answer to Count Four of Complaint

First Defense

Count Four of the said complaint fails to state a claim against defendant upon which relief can be granted. [29]

Second Defense

I.

Answering paragraph III of Count Four of said complaint, defendant admits that it is and was at all times mentioned therein a savings and loan association organized under the provisions of 12

U. S. Code, Section 1464; defendant admits that it does not have, and has not had at any time mentioned in said complaint, any certificate from the Superintendent of Banks of the State of California, but defendant alleges it does not need any such certificate and that defendant is not subject to the jurisdiction of the plaintiffs, or either of them.

Except as herein expressly admitted, defendant denies each and every allegation contained in said paragraph.

II.

Answering paragraph IV of Count Four of said complaint, defendant admits that it has at various times advertised and referred to itself as "Coast Federal Savings"; except as herein specifically admitted, defendant denies each and every allegation of fact contained in said paragraph, but neither admits nor denies the conclusions of law contained therein.

III.

Answering paragraph V of Count Four of the complaint, defendant denies each and every allegation of fact contained therein, but neither admits nor denies the conclusions of law contained therein.

Third Defense

Defendant is an instrumentality of the United States Government, and all of such acts as were done by defendant were done by virtue of and under the authority of the government of the United States. [30]

Fourth Defense

The laws and regulations of the government of the United States provide for administrative remedies and procedures for alleged violations of law by federal savings and loan associations. Said remedies and procedures have not been resorted to by the plaintiffs, nor exhausted by them.

Fifth Defense

By custom and usage in the financial business, financial institutions do not usually use their full corporate name on signs, in advertising and advertisements, in transacting business or to indicate the nature of their business.

Sixth Defense

Any and all acts, advertising and advertisements of defendant are permitted by the Laws of the United States, by the Rules and Regulations of the Federal Home Loan Bank Board, an agency of the United States, and by the Federal Savings and Insurance Corporation, an agency of the United States.

Seventh Defense

The public has not been misled by Coast Federal Savings and Loan Association of Los Angeles.

Answer to Count Five of Complaint

First Defense

Count Five of the said complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

I.

Answering paragraph III of Count Five of said complaint, [31] defendant admits that it is and was at all times mentioned therein a savings and loan association organized under the provisions of 12 U. S. Code, Section 1464; defendant admits that it does not have, and has not had at any time mentioned in said complaint, any certificate from the Superintendent of Banks of the State of California, but defendant alleges it does not need any such certificate and that defendant is not subject to the jurisdiction of the plaintiffs, or either of them.

Except as herein expressly admitted, defendant denies each and every allegation contained in said paragraph.

II.

Answering paragraph IV of Count Five of said complaint, defendant admits that it has circulated a paper known as "Coast Federal's Challenger." Defendant admits that in the October, 1949, issue of said paper there appeared the words set out on lines 5 through 19 on page four of said complaint. Defendant admits that some of said words have appeared in other issues of said paper.

Except as herein expressly admitted, defendant denies each and every allegation in said paragraph.

III.

Answering paragraph IVa of Count Five of said complaint, defendant admits that on page four of the October, 1949, issue of the "Challenger" in a

column entitled “ ‘Why I Hate Your Singing Commercial’ Winners * * *, ” there appeared the following excerpt of a letter received by defendant:

“Mrs. Mable E. Smith, who made the constructive suggestion of a dignified slogan such as: ‘Our Business Is Banking. Our Banking Is Business. We solicit your banking business.’ ”

as shown by Exhibit “A” attached hereto. [32]

Defendant denies each and every allegation contained in said paragraph, except as herein expressly admitted.

IV.

Answering paragraph IVb of Count Five of said complaint, defendant admits that it has at various times advertised and referred to itself as “Coast Federal Savings”; except as herein specifically admitted, defendant denies each and every allegation of fact contained in said paragraph, but neither admits nor denies the conclusions of law contained therein.

V.

Answering paragraph V of Count Five of said complaint, defendant denies each and every allegation contained in said paragraph.

Third Defense

Defendant is an instrumentality of the United States Government, and all of such acts as were done by defendant were done by virtue of and under the authority of the government of the United States.

Fourth Defense

The laws and regulations of the government of the United States provide for administrative remedies and procedures for alleged violations of law by federal savings and loan associations. Said remedies and procedures have not been resorted to by the plaintiffs, nor exhausted by them.

Fifth Defense

By custom and usage in the financial business, financial institutions do not usually use their full corporate name on signs, in advertising and advertisements, in transacting business or to indicate the nature of their business. [33]

Sixth Defense

Any and all acts, advertising and advertisements of defendant are permitted by the Laws of the United States, by the Rules and Regulations of the Federal Home Loan Bank Board, an agency of the United States, and by the Federal Savings and Insurance Corporation, an agency of the United States.

Seventh Defense

The public has not been misled by Coast Federal Savings and Loan Association of Los Angeles.

Wherefore, defendant prays:

1. That plaintiffs take nothing by their suit;

2. That the Court decree that defendant is subject to the Laws of the United States;

3. That the Court decree that this defendant, and all Federal Savings and Loan Associations, are not subject to the control and jurisdiction of the plaintiffs or either of them;

4. That the Court decree that the Banking Code of the State of California referred to in the complaint as applied to this defendant is in conflict with and subject to the Laws of the United States;

5. That the defendant has judgment against plaintiffs for their costs incurred herein; and

6. For such other and further relief as to the Court shall seem proper.

Dated November 9, 1949.

COAST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF LOS ANGELES,

By /s/ JOE CRAIL,
President.

CRAIL AND CRAIL,

By /s/ HARRY G. McMAHON,
Attorneys for Defendant. [34]

State of California,
County of Los Angeles—ss.

Joe Crail, being by me first duly sworn, deposes and says that he is President of Coast Federal Savings and Loan Association of Los Angeles, de-

fendant in the foregoing and above-entitled action; that he has read the foregoing Answer to Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOE CRAIL.

Subscribed and duly sworn to before me this 9th day of November, 1949.

[Seal] /s/ R. M. BLAKELY,

Notary Public in and for Said
County and State. [35]

COAST FEDERAL'S CHALLENGER

Second Floor, Merritt Building, 307 West Eighth Street • TUCKER 1351

Vol. 13, No. 27

October 3, 1949

Los Angeles 14, Calif.

STATISTICS

(This is probably going to be a very dull story, but Joe wants all you good Coast Federal members to read it, so that you will be informed about how YOUR Association is doing.)

Anyway, here are some figures: Coast Federal has paid out in total dividends, since its beginning, the sum of \$7,324,258.72. That represents money which our savings account holders got just by putting their savings at Coast Federal.

Our reserves total \$5,053,429.56. Our bonds and cash on hand total \$13,292,986.40.

We have \$15,710,486.54 in G. I. Home Loans on our books, backed up by the federal guarantee.

We have a total of 28,140 savings account holders, with a total of \$58,449,615.27 in their Coast Federal savings accounts.

Since its organization Coast Federal has financed a total of 21,303 home loans — which means that all those families were helped to own their own homes by our home loan department.

We have a total of 15 blondes, 39 brunettes, and 6 red-heads — all beautiful and all smart — working here.

—•—

Young Man Makes Good

Rex (Bob) Johnson, manager of Coast Federal's Ninth and Hill office building, has made a meteoric rise to success in the last few weeks. With no previous record at managing anything taller than a one-story bome, with wife and family, he became manager of our 12-story office building about a year ago. Being a conscientious person, he joined the Building Managers' Association of Los Angeles, and at its recent election, to his amazement (maybe "consternation" is the word) he was elected a director of the association, and then vice-president! Congratulations, Bob, we knew you had it in you!

(He's not still in uniform, as in this picture, but he says this is his latest photo.)



Founders' Portraits Unveiled

Have you seen our two handsome new portraits, one on each side of the main entrance to our 9th and Hill office? We'd like you to notice them next time you're in. They are pictures of Justice Charles S. Crail and Congressman Joe Crail, founders of our Coast Federal Savings association.

Shown here at the unveiling ceremony are Marshall F. McComb, Associate Justice of the District Court of Appeals, and an early member of Coast Federal's board of directors; Thomas P. White, Presiding Justice of the District Court of Appeals; and Coast Federal's president Joe Crail. Joe is the son of Justice Charles Crail, and he, too, was one of the original founders of Coast Federal.

Many of you folks probably came to Coast Federal in the first place because of your friendship for "the Crails." Let us know how you like the portraits, next time you're in.

PLACE YOUR SAVINGS AT COAST FEDERAL...

For ... SAFETY, with federal insurance up to \$5,000 per account;

For ... HIGHER RETURN ON YOUR SAVINGS; 3% per annum is the current rate;

For ... CONVENIENCE, and friendly service;

For ... AVAILABILITY — you can get your money when you want it.

Accounts Opened by the 10th of the Month Earn from the 1st

PERSONNEL-LITIES

This month's orchid goes to Joan Goodwin, for looking so wholesome that a motherly-looking soul asked Joannie if she could go out with her 19-year-old son!

Carol Martin is now Mrs. John Strook, since August 5th, and looking terribly happy about the whole thing.

Recent anniversaries included C. E. Angstad, for 12 years service with Coast Federal; and Gwen Powers and Myron Marquand, for 14 years of slavery apiece.

New employees include Nisan Matlin, staff architect for the Loan Appraisal Section (he's single, girls!); Alice Staunton, for the 8th and Broadway Savings Department; Marjorie Mund, in the Law Office — Marjorie is a native Californian, UCLA graduate, who had ideas of joining the foreign consular service and thus seeing the world, but who got as far as Washington, D. C., and then homesickness overtook her — so she came back to California and thus to Coast Federal. Then there's Jim Bradshaw, new lawyer — and he's a bachelor (so far). Then, we've got that cute Pat Gambold, another native Californian; Joann Schmoeller, who hails from Washington, Iowa; and pert Mary Andrich. Look over the new crop the next time you're in folks — we think they're okay. Incidentally, if you're wondering why we keep hiring new people, it's because our "old" people keep quitting us, to have babies, or get married, or stuff.

Wasn't that beach party fun!

The new howling season got off to a big start September 14th, with 50 Coast Fed folks showing up to man Ken Leathers' 10 new teams, plus the usual gallery of folks who can't bowl but who talk a good game. The teams are named, disrespectfully: Chuck's Comets, DA's Deadeyes, Johnny Jump-Ups, Laver's Lightnings, McBratney's Brats, Ruth's Ramblers, Seales' Sensations, Souter's Sharpies, Weston's Wonders, and Y. K.'s O.K.'s. (How corny can you get, Ken?)

Sparklers have appeared on the fingers of Eleanor Seales and Wilma Dalton — and pretty soon they'll be "Mrs." instead of "Miss" — and we think the men in the case are mighty darn lucky.

"Bad pennies" who have returned to Coast Federal's staff after an absence of one sort or another, include Elsie Christensen, who says she'll be around again until the Navy transfers her husband away from here; Don Wilcox, who has moved himself and his family back from Oregon; Betty Xenos, who took a couple of days off to have a baby.

When you speak to Yvonne Durrant nowadays, the proper way to address her is "Mrs. Jay Burnett."

Leaving to meet the stock are Beverly Moodie and Jean Cover (as if you all don't know that by now!)

Proud new home-owners on Coast Fed's staff are the George Edwards family, Ken Leathers, Flo and Bill Stage — and Ralph and Kay Kinnings are trying to find a lot to park their dream home.

COASTER



LESLIE R. LUMLEY

Coast Federal's Man-of-the-Month this month is a member of our Board of Directors, Leslie Robert Lumley. Les has been a director of Coast Federal since 1947 and is one of Coast Federal's biggest assets, with his wisdom about business and the bond market, and economic trends and stuff. We want you all to become better acquainted with him, so — well, read this:

Les was born in Urbana, Illinois, which he says is a town so small that nobody has ever heard of it. He was graduated from the University of Illinois in 1916, majoring in agriculture and business administration. And here's an interesting thing: he worked his way through the university as an automobile dealer, taking the Chevrolet and Oldsmobile agency in Champaign, Illinois, while a sophomore!

In 1917 he went into the Air Corps in the first World War. Then, in 1920 and 1921 he was sales manager for the Kansas City Refining Company at (by an odd coincidence) Kansas City. While he was there he attended law school for three years, but didn't graduate — decided he liked business better than law, probably.

Then in 1921 he came to California, and went back to his first love — the automobile business (having decided by that time that the automobile was here to stay) — taking the Oldsmobile agency in Anaheim. In the fall of 1922 he moved to Huntington Park with his Oldsmobile agency — and has been there ever since. He is now the "oldest" Oldsmobile dealer in Southern California, except one — but he doesn't like the sound of that "oldest" part — so we promised to point out that that doesn't refer to his age.

Mrs. Lumley has sold many other makes of cars, along with Oldsmobile, but now he has settled down to Oldsmobile and Cadillac.

His many titles include: president of Leslie R. Lumley, Inc., Olds and Cad agency in Huntington Park; president of Park Motors, Pontiac agency in Huntington Park (which he has operated for 15 years); president of Leslie R. Lumley Capital Company, a finance company and insurance brokerage business.

Les met Aileen Berry of San Francisco, while on a pleasure cruise somewhere, and married her in 1937. They have an 11-year-old redheaded son, Leslie, Jr., who, for some reason, is always called "Jason." Big Les's hobbies, outside of business, are swimming and sailing.

Les is a friendly sort of guy, and he'd be pleased if any of you other Coast Federal folks would drop in and say "hello" when you're down around his place of business.

The Letter Box...

"Hello, Joe: You know I am one of the most serious, sober-minded persons you ever saw, yet when I pick up your CHALLENGER to read I commence to laugh. For its size there are more laughs in that small sheet than any I ever read, and after looking at Joe Crail's picture I feel like I know him already. I read about everything in the little sheet, even the Want Ads, although the only thing in that department in which I am interested is widows — not too old — and I never see anything like that printed.

Here I am up in the Siskiyou, a-straddle of the Calif.-Oregon line where we have frosts any month of the year. Have lived mostly in a man's world; eleven years in the mineral belt on the eastern fringes of Death Valley; six years along the straits of Juan De Fuca looking over the blue ridges in Canada's back yard; and a spell on Moose Creek in Alaska near the Chickaloon big game district. I sometimes wonder what it is like in a woman's world, but I don't suppose the woman lives who would enjoy the solitary places that I like.

I have always been somewhat ashamed of my first name. For some reason my parents bestowed on me the girlish name of Alva. Now my school-kid friends of Port Angeles, Wash., during the time I was in contact with civilization there — both boys and girls, large and small — did a much better job naming me. They called me "Tonopah, the hard-rock miner" and if I came into sight, 'tho it be far down the street, never failed to yell at me "hello Tonopah" and sometimes added "you hard-rock miner."

A. E. STOVALL
Hills, California."

Thanks for your kind words, Tonopah, and for letting us print your interesting letter. We'll bet there's a Coast Federal widow, who'd like to correspond with you. (This is "out-of-bounds" for you Coast Fed employees.)

ANOTHER JINGLE WINNER...

"Because of service at its best,
Coast is the largest in the West;
Now, to serve you better still,
Another location, 9th and Hill."
And for that sonorous sonnet, Mrs. Kathy Tatsch wins Fifty Bucks.

**SAVE with SAFETY
and HIGH RETURN**

at

**COAST FEDERAL
SAVINGS**

YOUNG COASTERS



We thought you might like to see what the 1970 staff of Coast Federal will look like — only, of course, they'll be a little older then. So here are some sons and a daughter of our current staff, who, we hope, will some day be down here taking the reins of management away from their tired old dads and mothers. They already have their Coast Federal savings accounts — with higher returns, insured safety, availability, convenience and other stuff.

Above is Michael James Xenos, born March 21st, son of Betty Xenos of our Accounting Department. From the look of that Irish puss, we think you named him right, Betty.

On our right is Ralph Norton Kinnings, Jr., born April 25th, and called "Kippy." His pop is a Coast Federal Loan Counsellor, and Kippy already talks faster than the old man, so he's a cinch for the 1970 staff.

Down below sit Gale Susan and Gary Christopher Blunden — we're not sure which — born November 9th. Our guess is that the fellow waving his arms is probably Gary, and that the admiring "aren't you wonderful" look is on the face of sister Gale Susan.

Pretty cute crop this year, don't you think?



Herb Says...

Herb Mailliard, Loan Counselor Extraordinary, confides that Mr. Charles King came in the other day, to sign up some papers about something, and handed to Herb one of those "lucky records" which we dealt out back in July. Herb took off for the basement, record in hand, and soon came struggling up the stairs carrying 50 feet of green rubber garden hose. The following sharp conversation ensued:

Mr. King: "Is that the biggest prize you've got?"

Herb: "Well, I don't know that it's the biggest, but it certainly is the longest!"

Herb comments that Coast Federal goes to "great lengths" to keep our customers happy.



MARY JEAN'S STILL GOT A SAFE DEPOSIT BOX FREE FOR YOU

If your Coast Federal savings account has \$5500.00 or more in it you may have the free use of a safe deposit box in Coast Federal's handsome vault. Not only do you have a safe place to park your bonds or the diamond tiara you inherited from Great-aunt Mehitabel, but also you can sit down and cool off and rest your feet and gossip with Mary Jean about her cat, Mitzi.

We've got different size boxes, which you get in accordance with your size account, to-wit: \$25,000 or over entitles you to a box 10" x 5"; \$15,000 plus gets you a 10" x 3"; — and so on, down to 5" x 2" for a mere \$5500. That doesn't sound big enough — well, Mary Jean reports that all of them are 22" long.

That's at our Ninth and Hill office, by the way.

**Your Savings Account
Opened by the 10th of
the Month, Earns Interest
from the 1st! WHEEL**

WANT ADS

I have English Ivy starts to give away, free, if anyone will come and get them. Please call me at SYcamore 9-6504 before you come. Mrs. Matthews, 1101 Colmaria, South Pasadena.

FOR SALE: Custom made bassinet, like new, \$15. Also Hotpoint refrigerator, 6 cubic ft. '41 model. Mrs. D. A. Matera, AX 1-6357.

FOR SALE: Dohrmyer Mixer (new), Majongg set complete with racks, moneys, etc., electric juicer. All very reasonable. WA 7885.

WANTED: Antique buttons. Phone giving description. ALbany 5093.

FOR SALE: '43 Eastern built Glider house trailer; 2 rooms, sleeps 4. Two entrances. Good condition. Terms if desired, Sacrifice at \$450. Evenings or week-ends only. Santa Monica 722-16 (Venice).

FOR SALE: Haviland China dinner set, imported from France, 118 pieces, 18-kt. gold rim pattern. Also Gay Nineties party dress, size 14 or 16, and man's Tuxedo of early date, too, about size 36; both in 1st class condition, could be used as costumes. All very reasonable. SUN-set 2-1005.

WANTED: Late edition of "World Books" for children. Call Monrovia 1-3251.

FOR SALE: Very reasonable, several ladies' black dresses, size 40, and beautiful 5-skin blended baum martin furs, has never been worn. Great sacrifice. Whitney 1491.

FOR SALE: 24 very unusual and beautiful hand-painted bread and butter plates, \$75. RE 2-7380 mornings or late evenings.

FOR SALE: 4 hand-hammered antique bronze plaques, 12" in diameter. Also, white evening gown, size 36, and man's brown wool ulster with belt. Worn once. EXposition 9516.

FOR SALE: ¾ size violin and case, excellent condition, \$40. JEFFerson 3764 or JEFFerson 1452.

FOR SALE: Squirtle lock cape \$40; winter turquoise blue coat \$40. FE 1757.

FOR SALE: Infra red lamp \$25; pet basket \$3.50; swing \$5; 2 evening dresses, white crepe \$15. Delft blue lace \$15, 36 size; 1 long and wide silk velvet scarf, trimmed in metal cloth for evening wear. PL 1-4661.

ROLLER SKATING CLUB. All over 20 years of age are eligible to join. If interested, phone OL 0105.

WILL STORE piano with best of care. EX 0391.

FOR SALE: 9-cubic ft. Westinghouse refrigerator, in A number one condition, good buy for interested parties. YO 1227.

WANTED: Good cook for large family, must be good natured and like children. Live in. Top salary. RYan 1-6157.

COAST TOASTIES

Olin Keller comments that the most obstinate person he's ever heard of was the historian who noticed that Lady Godiva had a horse with her.

PROSECUTOR: "Now tell the court how you came to take the car."

DEFENDANT: "Well, the car was parked in front of the cemetery, so naturally I thought the owner was dead."

MONROE MORGAN: "Where'd you get the black eye, George? Were you in a fight?"

GEORGE ROBERTSON: "Yeah. It was this way. I was in a phone booth talking to my girl last night, when a guy grabs me by the neck and yanks me out of there."

MONROE: "That made you pretty mad, huh?"

GEORGE: "Well, yes, but I didn't get really mad until he reached back in and yanked out my girl, too."

STEVE: "Say, doc, do you remember last year when you cured my rheumatism? You told me to avoid dampness."

DOC: "That's right. What's wrong now?"

STEVE: "Well, can I take a bath now?"

Believe it or not but our president, Joe Crail, used to teach a Sunday School class. After the services one Sunday morning he was approached by an old lady who expressed great appreciation for his discourse. "You can never know what your talk meant to me," she said. "Why, it was just like water to a drowning man."

BILL: "Joan says she thinks she could learn to love me."

CHUCK: "You don't look very happy about it."

BILL: "Well, it's going to be pretty expensive. Last night I took her to a movie and to a night club. The first lesson cost me about \$15."

Freddie, four years old, came down stairs bellowing loudly. "What's the matter?" asked his mother.

"Papa was hanging a picture and just hit his thumb with the hammer," said Freddie.

"That's not serious," soothed his mother.

"A big boy like you shouldn't cry about that. Why didn't you just laugh?"

"I did," howled Freddie.

BILL KACHIC: "Say, Jim, would you like to see a model home?"

JIM BRADSHAW: "Sure, what time is she through work?"

DON COLLINS: "I've invented a device for looking through a brick wall."

LEE GRAVERSON: "What's it called?"

DON: "A window."

MARJORIE MOCK: "Where are you going in such a hurry?"

ERNIE MOCK: "Over to Don's house. He just telephoned to ask if I could lend him a cork screw, and I am taking it over myself."

MARJORIE: "Couldn't you send it over?"

ERNIE: "Mrs. Mock, the question you asked me shows why most women are unfit to lead armies and make quick decisions in business deals involving millions. When the psychological moment arrives, they don't know what to do with it."

"Why I Hate Your Singing Commercial" Winners ...

As usual, our Committee on Daring Contest Winners couldn't make up its mind about which of the letters on the darned singing commercial was best — so instead of awarding one \$25 prize, we're awarding six \$25 prizes. And only grim determination on the part of budget-balancing controller Bob Souter kept them from sending \$25 to every one of the hundreds of letter-writers.

Here are the winners. I wish we had space to print the whole of their very interesting letters.

Mrs. Robert G. Host, who complained because her baby's first words were "Los Fed saves me" — instead of "Mama."

Mrs. Mable E. Smith, who made the constructive suggestion of a dignified slogan such as "Your Business is Banking, Our Banking is Business. We solicit your banking business."

Bob Downer of Laguna Beach, who made some valuable suggestions, and commented that "there's no mention at all of the most important thing about Coast Federal — the friendly people. Most banks and loan associations seem to regard you as a criminal if you have any money to deposit and a bum if you make a withdrawal or loan. You feel like you owe every clerk and the manager an apology every time you walk in the door of those places. Two years ago I left Los Angeles, and I withdrew my savings from Coast Federal to buy a car and trailer, but I left a dollar there to keep my account open. The High Cost of Living hits me so hard that sometimes I wish I had that back to spend, but it stays at Coast Federal just so I can say I'm a depositor. That's how much Coast Federal's friendly spirit means to me."

Larol M. Holt, for her poetic entry, which really rhymed and wailed, and also made good sense.

Mrs. L. W. Cook — and we're writing to ask her if we may print her letter in its entirety — it's that worthwhile.

Alice B. Pearce — who says she hates the commercial because it's "such a catchy little tune" that it made her transfer her savings "from one of those places that give you so little interest you just know they are bored to carry the account," to Coast Federal. She says, "Now when I get a desire for a new hat or even a much needed suit, I can't get it. It was so easy before to get it; I wasn't getting any interest to speak of anyway. But now, oh that interest! So I'll just brush up my old hat

MISCELLANY ...

The Lost and Found department reports the following items now on hand — did you lose any of them?

Spectacles
Pearl bracelet
Gold pin with pearls
California Bank check book
Tiny lapel pin
clip-on sunglasses
1 silver earring
Pair of gloves
2 pair of panties (hey!)

**DON'T FORGET THAT
COAST FEDERAL IS
OPEN MONDAY NIGHTS
UNTIL 9 FOR
YOUR CONVENIENCE.**

The Postman brought this:

"I lika de good old Joe."

"I lika da mon dat he shou."

"I passa ma book an getta ma mon."

And what do you tink, dey call it fun."

WELL WISHER"

Come on out from behind that anonymity and let us know who you are, you budding poet. We lika your poetry.

and suit and cuss the singing commercial, but that money stays right in Coast Federal."

Bob Souter points out that we haven't really quoted any of the uncomplimentary (sometimes vitriolic) things which were said about the singing commercial in these winning letters. Well, there were plenty of them — and we appreciate the helpful spirit in which they were written — and we're overwhelmed our singing-commercial-happy advertising man with your complaints, and thanks!

**OPEN YOUR COAST FEDERAL SAVINGS
ACCOUNT NOW!**

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION

The Largest in the West

Joe Crail, President

307 WEST 8th STREET

NINTH AND HILL STREETS

Tucker 1351

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

PRE-TRIAL MEMORANDUM OF DEFEND-
ANT COAST FEDERAL SAVINGS AND
LOAN ASSOCIATION OF LOS ANGELES

Summary of Dispute

The moving plaintiff in this action is Maurice C. Sparling, as the Superintendent of Banks of the State of California.

The defendant is Coast Federal Savings and Loan Association of Los Angeles, a Federal savings and loan association organized and incorporated by the Government of the United States under 12 United States Code 1464.

The action is civil in nature and was originally brought in the Superior Court of Los Angeles County in the State of California, a State court.

The defendant petitioned this Honorable Court for removal, as defendant believes that this action is one of which the District Courts of the United States have original jurisdiction.

The moving plaintiff complains that: [41]

(1) the defendant is not a bank as defined by California law;

(2) the defendant has no certificate from the plaintiff to engage in business;

(3) the defendant has no authority or right from California to engage in banking business or solicit or receive money on deposit;

(4) the defendant is subject to the jurisdiction of the plaintiff; and

(5) the defendant represented itself as a California Savings Bank and so transacted business.

The defendant believes that:

(1) the plaintiff has no jurisdiction over the defendant;

(2) the Government of the United States exercises full, complete and exclusive jurisdiction over defendant;

(3) the defendant violated no California law;

(4) the California laws cited by the plaintiff do not apply to Federal savings and loan associations, were not intended to apply to Federal savings and loan associations, and if the intention was that such statutes apply to Federal savings and loan associations, such statutes would be in conflict with Federal law;

(5) if the defendant did act contrary to California statutes, it did so while exercising the privileges and powers given it by the Federal Home Loan Bank Board, and such privileges and powers are not subject to interpretation, limitation or extension by a State officer;

(6) all the acts of the defendant are subject to review by the Federal Home Loan Bank Board and by the Federal Savings and Loan Insurance Corporation;

(7) the subject of regulation of Federal savings and loan associations is one of nation-wide importance, and if the various agencies of the several States could each set regulations and limitations for the Federal savings and loan associations [42] within their borders, the effectiveness of nation-wide regulation by the various agencies of the United States, given by Acts of the Congress of the United States, would be curtailed; and that

(8) there is a clear path of administrative remedy set up for the moving plaintiff to follow, which the moving plaintiff has not followed, except in one instance. In that instance the moving plaintiff notified the agent of the Federal Home Loan Bank Board that the size of the word "Bank" as part of the phrase "Member Federal Home Loan Bank" on the windows of the office of the defendant appeared to be of disproportionate size. When the agent of the Federal Home Loan Bank Board suggested that such be changed, the defendant complied.

The defendant admits that

(1) it has used, and continues to use, in its advertising less than all of its full name, Coast Federal Savings and Loan Association of Los Angeles;

(2) it has represented itself, and continues to so represent itself, as a member of the Federal Home Loan Bank, which it is;

(3) it has used the word "Savings" as part of its corporate name, which contains the word "Savings"; and that

(4) it has used the word "Bank" as part of the phrase "Member Federal Home Loan Bank." The defendant denies that

(1) it has represented itself as a California Savings Bank; or that

(2) the moving plaintiff, or the People of the State of California, or any of them, have jurisdiction over the defendant.

Statement of Points of Law

I. The Bank Act and Banking Code were not intended to apply to Federal savings and loan associations.

A. A statute should be so construed as to be constitutional [43] in its entirety.

23 California Jurisprudence, "Statutes," sec. 131, p. 757.

5 California Jurisprudence, "Constitutional Law," sec. 46, p. 615.

Miller v. Municipal Court, 22 Cal. 2d 818, 142 Pac. 2d 297, (1943).

Shealor v. Lodi, 23 Cal. 2d 647, 145 P. 2d 574, (1944).

1. The Banking Code is limited in its application to national banking associations to so much of the code as is not inconsistent with Federal law. No

such partial application is provided for as to Federal savings and loan associations.

California Banking Code, sec. 100.

B. Statutes which relate to the same general subject matter must be read and construed together even though passed at different times.

23 California Jurisprudence, "Statutes," sec. 163, p. 785.

Old Homestead Bakery v. Marsh, 75 Cal. App. 347, 242 Pac. 749, (1925).

1. According to California legislative declaration, Federal savings and loan associations are outside the jurisdiction and supervision of the State of California.

Deering's General Laws, Act 986, secs. 12.11, 12.12.

2. In particular, the statutory provisions cited in Count IV, paragraph IV, of the complaint have reference only to State building and loan associations.

Deering's General Laws, 1931, Act 986, secs. 2.02 and 12.06.

Deering's General Laws, 1944, Act 986, secs. 2.02 and 12.06.

Deering's General Laws, 1944, Act 986, secs. 1.01 and 1.02. [44]

II. All acts of defendant complained of in the complaint have been done under Federal authority.

Home Owners' Loan Act of 1933, sec. 5 (12 USC 1464).

Rules and Regulations for the Federal Savings and Loan Systems, secs. 202.2, 202.3, 203.6 of Title 24 C.F.R. prior to 1949.

Charter of Coast Federal Savings and Loan Association of Los Angeles, secs. 3, 6 and 7.

Rules and Regulations for the Federal Savings and Loan System effective August 15, 1949, secs. 141.3, 141.4, and 141.5 of Title 24 C.F.R.

“Suggestions for Federal Savings and Loan Associations in Giving Information to the Public,” issued by the Federal Savings and Loan Insurance Corporation in 1938.

III. State laws attempting to regulate Federal savings and loan associations are invalid when they conflict with Federal law.

McCulloch v. Maryland, 17 U. S. (4 Wheatley) 316, 4 L. Ed. 479, (1819).

Davis v. Elmira Savings Bank, 161 U. S. 275, 40 L. Ed. 700, 16 Sup. Ct. 502, (1895).

Easton v. Iowa, 188 U. S. 220, 47 L. Ed. 452, 23 Sup. Ct. 288, (1903).

First National Bank of San Jose v. California, 262 U. S. 366, 67 L. Ed. 1030, 43 Sup. Ct. 602, (1923).

First Federal Savings and Loan Association of Wisconsin vs. Finnegan, 19 Fed. Supp. 678 (Wisc. 1937); affirmed 97 Fed. (2d) 831, 121 A.L.R. 99 (1938); constitutional question to Attorney General certified, 305 U. S. 564, 83 L. Ed. 355, 59 Sup. Ct. 92;

certiorari dismissed 305 U. S. 666, 83 L. Ed. 432, 59 Sup. Ct. 363.

Bridewell, "Applicability of State Laws to Federal Savings and Loan Associations," 6 John Marshall Law [45] Quarterly, pp. 508-521, June, 1941.

IV. The Federal government has so occupied the field of regulation of Federal savings and loan associations that the State is without jurisdiction.

Home Owners' Loan Act,

Secs. 5(a), 5(d) and 5(f) (12 U.S.C. 1464).

Rules and Regulations for the Issuance of Accounts by the Federal Savings and Loan Insurance Corporation, sec. 161.5(e) of Title 24 C.F.R. (Formerly 24 C.F.R. 301.7(e).)

First Federal Savings and Loan Association of Wisconsin vs. Finnegan, 19 Fed. Supp. 678 (Wisc. 1937); affirmed 97 Fed. (2d) 831, 121 A.L.R. 99 (1938); constitutional question to Attorney General certified, 305 U.S. 564, 83 L. Ed. 355, 59 Sup. Ct. 92; certiorari dismissed 305 U.S. 666, 83 L. Ed. 432, 59 Sup. Ct. 363.

First Federal Savings and Loan Association of Meriden v. Danaher, Commissioner, 128 Conn. 98, 20 At. 2d 455 at 464 (1940).

John Fahey v. Mallonee,

332 U.S. 245, 256; 91 L. Ed. 2030, 2040; 67 Sup. Ct. 1552, 1557 (1946).

Linde Air Products Co. v. Johnson,

77 Fed. Supp. 656, 658 (1948).

V. Plaintiff has available administrative remedies.

Rules and Regulations for the Federal Savings and Loan System (effective August 15, 1949), sec. 142.2 of Title 24 C.F.R.

VI. Administrative remedies must be exhausted before a court action may be properly commenced.

Gates v. Woods,

169 Fed. (2) 440 (4 C.C.A. 1948).

Brown v. Lee,

51 Fed. Supp. 85 (Calif. S.D. 1943).

Dated February 17, 1950. [46]

CRAIL AND CRAIL,

By /s/ HARRY G. McMAHON,

An Associate of the Firm.

[Endorsed]: Filed February 17, 1950. [47]

[Title of District Court and Cause.]

MEMORANDUM OF PLAINTIFFS' VIEWS FOR INFORMAL PRE-TRIAL

Plaintiffs' views herein may be briefly summarized as follows:

1. Section 3390 of the California Banking Code provides that:

“No person which has not received a certificate from the superintendent authorizing it to engage in the banking business shall solicit

or receive deposits, issue certificates or deposit with or without provision for interest, make payments on check, or transact business in the way or manner of a commercial [48] bank, savings bank, or trust company.”

2. Section 3391 of the same Code provides that no such person “shall advertise that it is accepting deposits, and issuing notes or certificates therefor, or make use of any office sign, at the place where its business is transacted, having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank or trust company, that deposits are received there or payments made on check, or any other form of banking business transacted,” nor

Shall “such person make use of or circulate any letterheads, billheads, blank notes, blank receipts, certificates, or circulars, or any written or printed paper, whatever, having thereon any artificial or corporate name or other words indicating that such business is the business of a bank, commercial bank, savings bank, or trust company, or transact business in such a way or manner as to lead the public to believe that its business is that of a bank or trust company.”

3. Section 3393 of the same Code provides that no building and loan association shall advertise or hold itself out to the public as a savings bank.

4. Section 3395 of the same Code makes any violation of any of the foregoing provisions sub-

ject to a penalty of \$100.00 a day and also authorizes an injunctive proceeding.

5. Defendant is a Federal Savings and Loan Association organized under authority of the Federal Home Loan Bank Board pursuant to 12 U.S.C.A. 1464.

6. The powers and duties of such savings and loan associations are not too clearly set forth by the Federal Act. However, as stated in section 1464 they are primarily "to provide local mutual thrift institutions in which people may [49] invest their funds and in order to provide for the financing of homes." (Emphasis added.) Such savings and loan associations are generally considered as synonymous with building and loan associations. (See Hopkins Fed. S. & L. Assn. v. Cleary (1935), 296 U.S. 315, 335-6, 56 S. Ct. 235, 240, 80 L. Ed. 251; First Fed. S. & L. Assn. v. Finnegan (1937), 19 Fed. Supp. 678. (1938) 97 Fed. 2d 831.) Such savings and loan associations automatically become members of the Federal Home Loan Bank of the district in which the association is located.

7. Subdivision (b) of section 1464 states of such associations that, "No deposit shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the board."

8. Section 102 of the California Banking Code defines "bank" as follows:

"The word 'bank' as used in this code means any incorporated banking institution which

shall have been incorporated to conduct the business of receiving money on deposit, or transacting a trust business as herein defined. The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business shall be deemed to be doing a commercial or savings bank business whether such deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing; provided, that nothing herein shall apply to or include money or its equivalent left in escrow, or left with an agent pending investment in real estate or securities for or on account of his principal. It shall be unlawful for any corporation, [50] partnership, firm, or individual to engage in or transact a banking business within this State except by means of a corporation duly organized for such purpose."

9. Section 104 defines "savings bank" as follows:

" 'Savings bank' means a bank or the savings department of a bank authorized to receive savings deposits repayable with or without interest; to lend money on the security of real or personal property; to buy and sell for the account of customers and, if eligible for investment, for its own account, securities, gold and silver bullion, gold coins, and bills of exchange; and generally to transact a savings bank business."

10. One of the commonly accepted functions

characterizing banking business is the acceptance of deposits payable on demand. Therefore, in view of the express prohibition contained in 12 U.S.C.A. 1464(b) and the fact that there is no authorization giving to Federal savings and loan associations the power to do a banking business, it is plaintiffs' position that the defendant is not a Federal bank nor authorized by a Federal charter to do a banking business.

A bank is an institution which receives and pays out deposits. *Moran v. Cobb* (1941), 120 Fed. 2d 16, 22; *Staunton Industrial Loan Corp. v. Commissioner of Internal Revenue* (1941), 120 Fed. 2d 930, 933-4; *Rosenblum v. Anglim* (Cal., 1943), 135 Fed. 2d 512, 513; *Kansas v. Hayes* (1932), 62 Fed. 2d 597, 600; *American Sugar Refining Co. v. Anderson* (1937), 20 Fed. Supp. 55, 56.

"Necessary element of 'banking business' in law excepting bank corporations from bankruptcy is receipt of [51] deposits for use in business." (Syllabus.) "In short, while there may be other attributes which a bank may possess, yet a necessary one is the receipt of deposits which it may use in its business." *Gamble v. Daniel* (1930), 39 Fed. 2d 447, 450-1.

In *State v. Leland* (1904), 91 Minn. 321, 98 N.W. 92, 93, the court said that "The receiving of deposits, to be kept, and returned on demand, is the generally acknowledged feature of every bank, * * *, whereby its profits are obtained and business success accomplished; * * *"

"Strictly speaking, the term 'bank' implies a

place for the deposit of money, as that is the most obvious purpose of such an institution.” *Western Investment Banking Co. v. Murray* (1899), 6 Ariz. 215, 56 Pac. 728, 731.

In passing upon a provision of the Internal Revenue Law the United States Supreme Court in *Oulton v. German Savings and Loan Society of California* (1872), 84 U.S. 109, 118-119, 21 L. Ed. 618, in speaking of banks said:

“Banks in the commercial sense are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency [52] and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense, and unless such a bank is brought within the proviso

under consideration, is equally subject to taxation as if authorized to make discounts and issue circulation as well as to receive deposits.”

11. Defendant is not authorized under the Federal Charter and Laws to do a banking business. Insofar as defendant lawfully exercises the powers and functions with which it is invested under the Federal Act, it is not subject to State regulation, but it may not outside of such lawful and authorized powers engage in any activities or operation contrary and in conflict with State law. All that plaintiff seeks here is to prevent defendant from leading the public to believe that it is engaged in a banking business.

12. Attached to the complaint as Exhibit “A” are photographs of defendant’s place of business, which photographs in our opinion quite plainly show that defendant by means of the differentiation in the size of type used in the lettering on its offices and the emphasis thereby placed upon a portion of its name “Coast Federal Savings” and the word “Bank” created in the minds of the public the impression that it was engaged in a banking business.

13. In addition thereto, in its advertising by means of using only the portion of its name “Coast Federal Savings” and leaving out the balance thereof “and Loan Association” and by using the words “Bank” and “Banking” sought to and [53]

did lead the public to believe that it was engaged in a banking business.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the
State of California;

WALTER L. BOWERS,
Assistant Attorney General;

BAYARD RHONE,
Deputy Attorney General;

/s/ WALTER L. BOWERS,
Assistant Attorney General,
Attorneys for Plaintiff.

[Endorsed]: Filed February 23, 1950. [54]

[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas, due to inadvertence, copies of the photographs which, as Exhibit A, were made a part of the complaint of plaintiffs herein when the within action was instituted in the Superior Court of the State of California, were omitted from the duplicate copy of said complaint when said action was removed on petition by defendant to this Honorable Court, and further;

Whereas, the photographs attached hereto are true copies of the aforesaid photographs, making,

in all, a complete and true copy of Exhibit A of plaintiffs' complaint herein;

Now, Therefore, It Is Stipulated and Agreed by and between the undersigned parties, as represented by their counsel, that the photographs attached hereto are in fact a complete and true copy of Exhibit A of plaintiffs' complaint herein, and that they may be now filed as such with the court with like effect as though [56] they had in fact been annexed to and filed with the aforesaid duplicate copy of plaintiffs' complaint.

Date March 8, 1950.

CRAIL AND CRAIL,

By /s/ HARRY G. McMAHON,
An Associate of the Firm.

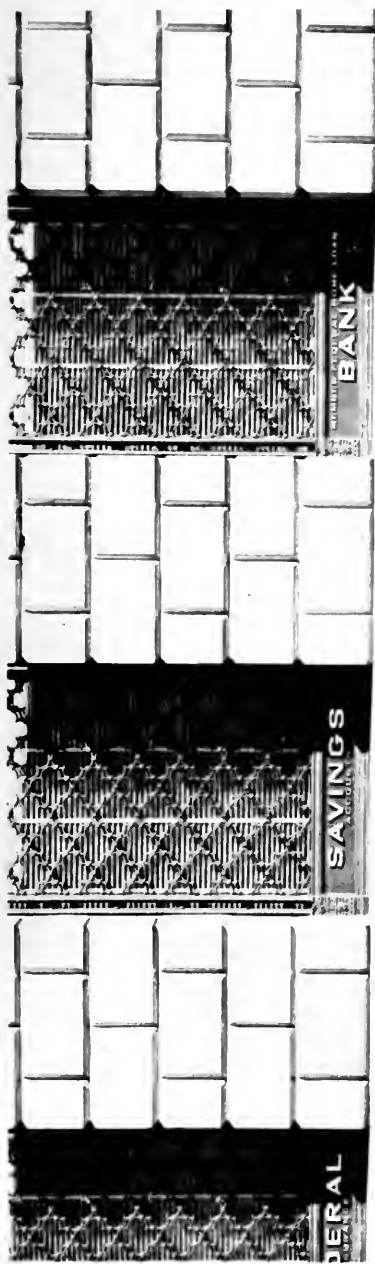
Date March 8, 1950.

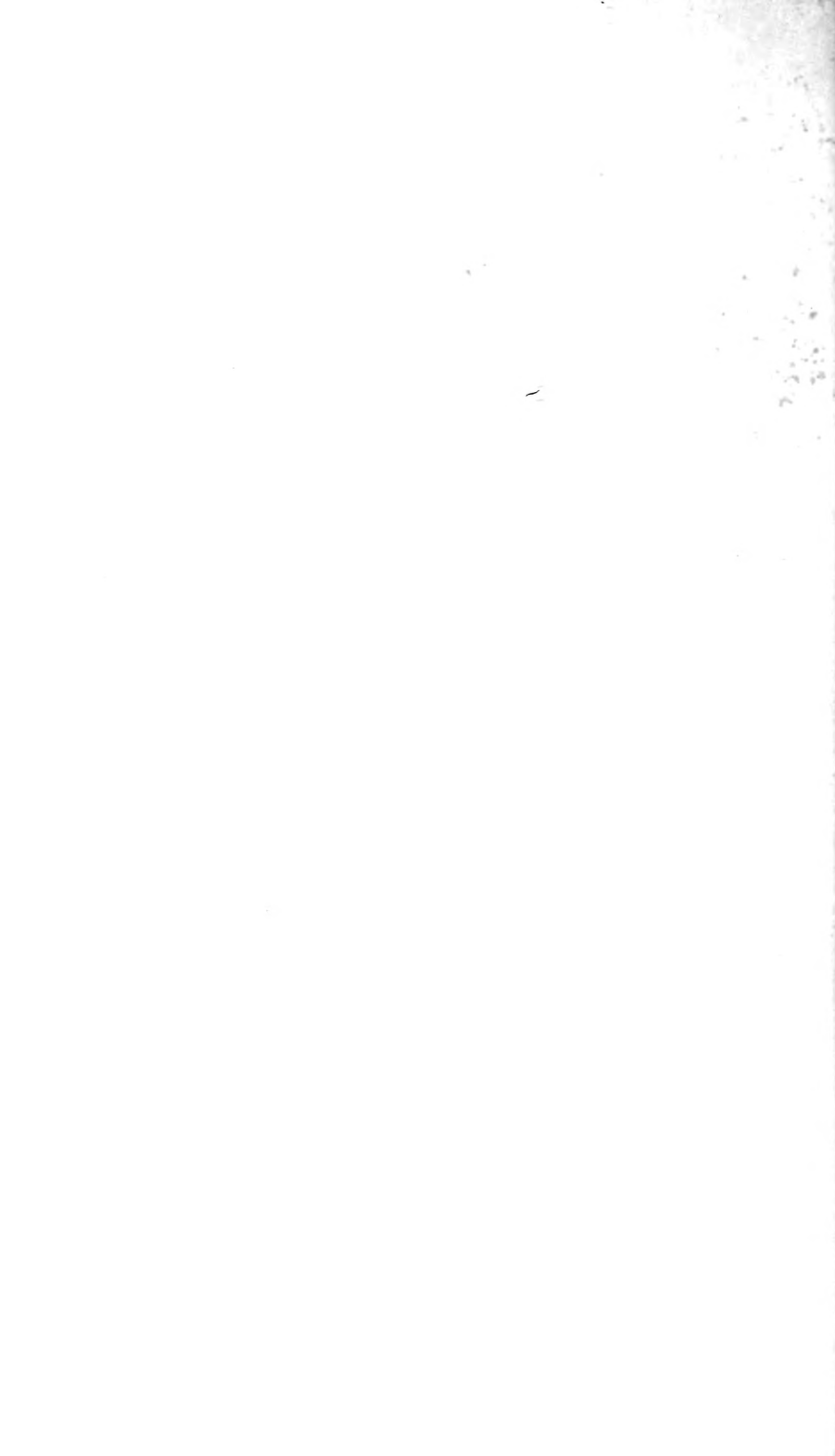
/s/ WALTER L. BOWERS
Assistant Attorney General.

It is so ordered March 17, 1950.

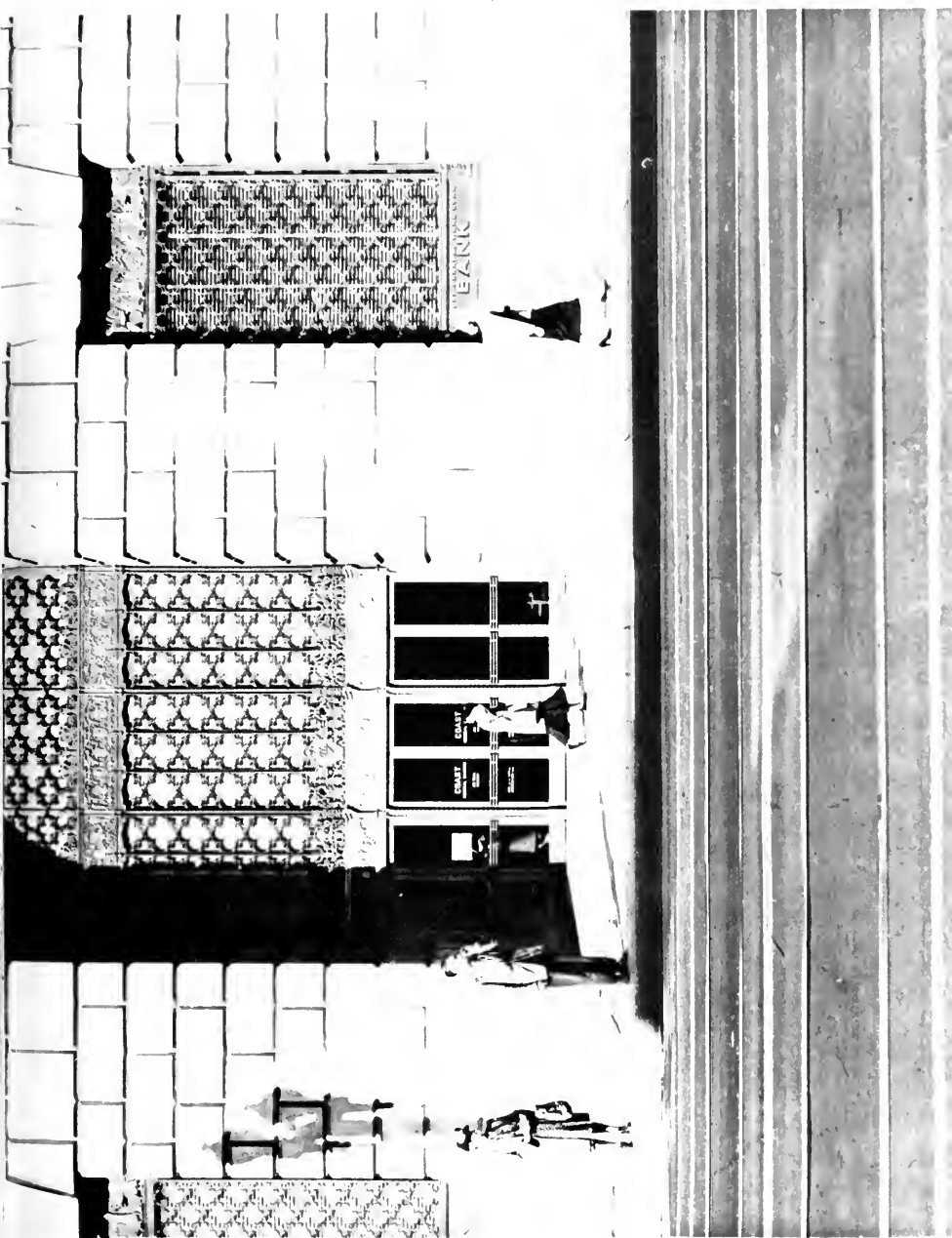
/s/ JAMES M. CARTER,
Judge. [57]

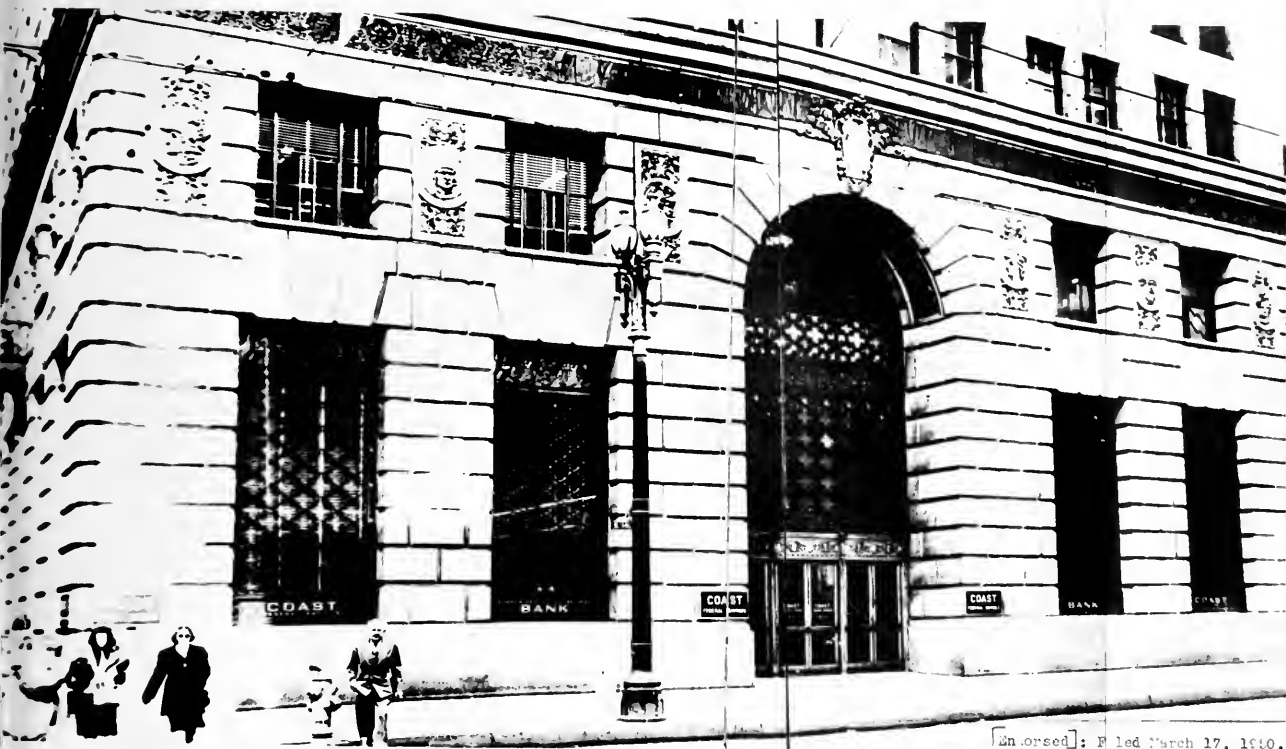












[En.orsed]: Filed March 17, 1910.



[Title of District Court and Cause.]

SUPPLEMENTAL PRE-TRIAL MEMORAN-
DUM OF DEFENDANT COAST FEDERAL
SAVINGS AND LOAN ASSOCIATION OF
LOS ANGELES

A. Preliminary Statement—The views expressed by defendant in its original pre-trial memorandum have not altered with the passage of time. Defendant reaffirms them at this point as though they were set out at length herein.

B. Reply to “Memorandum of Plaintiff’s Views for Informal Pre-Trial.”

(1) Defendant concedes that Plaintiff has accurately quoted from Sections 3390, 3391, 3393, 3395, 102, and 104 of the California Banking Code. The materiality of these statutes to the issues presented by this case for determination, however, is disputed on the grounds that:

(a) The California Banking Code is inapplicable to federal savings and loan associations lawfully doing business in [64] California.

Pre-Trial Memorandum of Defendant,
Page 3, Point I and cases cited.

(b) If the California Banking Code were intended to be applicable to defendant it would be invalid to the extent that it is in conflict with paramount federal legislation regulating federal savings and loan associations.

Pre-Trial Memorandum of Defendant,
Page 5, Point III and cases cited therein.

(2) Defendant concedes Plaintiff's point that a bank is authorized to receive and pay out deposits. Defendant disputes the implication contained in plaintiff's memorandum, however, that banks hold a monopoly on the use of the word "deposits."

There is, unfortunately, a great deal of confusion in the law as to exactly what the word "deposit" connotes. Plaintiff contends that the word has no established independent legal significance. The California Code of Civil Procedure itself recognizes that, in the broadest sense of the word, at least, funds invested in federal savings and loan associations are deposits.

"Sec. 1274.3. (Bank, etc., deposits unclaimed for 20 years presumed abandoned: Property included.) All amounts of money heretofore deposited with any person which is a State bank, National banking association, savings bank, commercial bank, trust company, State building and loan association, Federal savings and loan association, savings union, credit union, or any other similar type of corporation or organization, and appearing as of January 1, 1945, on the books and records of said person as due or owing to the owners thereof and all amounts hereafter deposited with any such person to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, and which shall have remained unclaimed for more than 20 years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor nor any claimant has filed any notice with such person

showing his or her present residence, and the present residence and whereabouts of the depositor or claimant are unknown shall, with the increase and proceeds thereof, be presumed to be abandoned. The foregoing definition of property presumed to be abandoned shall be construed to include all amounts held or owing by any such person to which an owner is entitled whether designated as bank deposits, time deposits, demand deposits, [65] savings deposits, certificates of deposit, investment certificates, shares, certificates of shares, credits, certificates of credits, or by any other similar designation. (Added by Stats. 1945, ch. 1080, Sec. 1.)”

Likewise, the courts have often recognized that investments in the shares of “thrift institutions” such as federal savings and loan associations are deposits in the usual sense of the word although, perhaps, not in the sense commonly employed by bankers, or in the sense in which the word is used in 12 U.S.C.A. 1464b.

Aberdeen Savings and Loan Association v. Chase, 157 Wash. 351, 289, p. 536, 290, p. 697 (1930).

Morris Plan Bank of New Haven v. Smith, 135 F. (2d) 440, 442.

Staunton Industrial Loan Corp. v. Commissioner of Internal Revenue, 120 F. (2d) 930, C.C.A. 4 (1941).

(3) Defendant, of course, denies that it has ever engaged in the banking business, except to the extent that the functions of a federal savings and loan

association are the same as those of a bank. It likewise denies that it has ever intentionally, or otherwise, led the public to believe that it was engaged in the banking business, or any other business except the savings and loan business. However, even assuming that defendant were engaged in the banking business or leading the public to so believe, defendant contends, for the reasons given herein and in its Pre-Trial Memorandum, that plaintiff would have no claim against it upon which relief could be granted.

C. The federal government or its agencies alone may regulate or restrain the activities or manner of doing business of a federal savings and loan association.

First Federal Savings and Loan Association of Wisconsin v. Finnegan, 19 F. Supp. 678; affirmed 97 F. (2d) 831, (1938). Certiorari dismissed 305 [66] U.S. 666.

The North Arlington National Bank v. Kearny Federal Savings and Loan Association, U.S.D.C. (New Jersey), Civil Action No. 451-49. Decided September 12, 1950. True copy of opinion attached hereto and by reference made a part hereof.

In the Finnegan Case the State of Wisconsin was opposing the federal savings and loan association, whereas in the North Arlington National Bank Case, a competitor brought the action. In each case, the opponents, as here, were attempting with the aid of the court on the basis of state law to regulate

or restrain the activities of a federal savings and loan association duly chartered under the authority delegated by Congress to the Home Loan Bank Board. In each case the court held, in effect, that the plaintiff did not state a claim upon which relief could be granted.

D. Conclusion: Defendant contends that the law which controls this case is based upon the sound public policy that corporations created by federal authority are controlled by federal authority. They should be permitted to function free of all interference so long as they obey the law and serve their purpose. If they act beyond their powers it is for the federal government to return them to the fold.

CRAIL AND CRAIL,

By /s/ HARRY G. McMAHON,

An Associate of the Firm. [67]

(Copy)

EXHIBIT A

United States District Court

District of New Jersey

Civil Action No. 451-49

THE NORTH ARLINGTON NATIONAL BANK,

Plaintiff,

vs.

KEARNEY FEDERAL SAVINGS AND LOAN
ASSOCIATION,

Defendant.

OPINION

HERRIGEL, LINDABURY & HERRIGEL,
ESQS.,

Attorneys for Plaintiff.

KOCH, GILLESPIE & MASINI, ESQS.,

Attorneys for Defendant.

FRED N. OLIVER, ESQ.,

Amicus Curiae on Behalf of National Association
of Mutual Savings Banks.

ALFRED E. MODARELLI, ESQ.,

Amicus Curiae on Behalf of the United States.

THEODORE D. PARSONS, ESQ.,

Amicus Curiae on Behalf of The State of New
Jersey.

Fake, Chief Judge

This suit was instituted in the State Court under the New Jersey Declaratory Judgment Act,

N.J.S.A. 2:26-66, et seq., and removed to this court upon the assertion that the complaint is founded on a claim or right arising under the Constitution and laws of the United States. That it does so arise will be noted from what follows.

The complaint discloses that the gravamen of the action lies in the allegation that the Home [68] Loan Bank Board functioning under the Home Owners Loan Act of 1933, 12 U.S.C.A., 1461, et seq., unlawfully issued to the defendant loan association an authority to open a branch office near the plaintiff's banking house. The existence and operation of this branch office, within a few doors of plaintiff's place of business, is alleged to constitute unlawful competition.

Before an action may be maintained under the New Jersey Declaratory Judgment Act, above cited, a justiciable issue must be shown to exist. *Empire Trust Co. vs. Board, etc.*, 11 Atl. 2nd, 752, at page 754.

The plaintiff here does not, nor can it claim, an exclusive right to transact business in a given territory. It is not protected by law against any and all competition. The specific thing it complains of here, as above stated, is the existing branch office of defendant loan association functioning with the express approval of the Home Loan Bank Board. The branch is, in effect, an integral part of defendant's home office. Any attack therefore made upon the validity of the existence of the branch is, in effect, also an attack upon the charter of the loan association as thus extended. This being so, no

competitor can attack it as beyond the scope of federal authority. Such action is reserved to the government in an action analogous to a quo warranto proceeding, or perhaps an attack may be made by a party having an interest in the loan association, on the ground of ultra vires. The reasoning on these points is found in *Alabama Power Co. v. Ickes*, 302 U.S. 464, with special reference to pages 479 to 485, wherein that court points out that the plaintiff [69] therein could not sustain its action. A reading of that opinion explains the approach here.

My conclusion is that the complaint herein fails to disclose a claim upon which relief can be granted by this court.

Filed September 12, 1950.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 9, 1950. [70]

[Title of District Court and Cause.]

PETITION FOR LEAVE TO APPEAR AS
AMICUS CURIAE AND ORDER THEREON

To the Honorable James M. Carter, Judge of the
Above-Entitled Court:

Your petitioner, as a friend and attorney of the Court, respectfully requests that the above-entitled cause involves difficult and novel questions the determination of which will vitally affect controversies

between persons other than the parties thereto; that as attorney for such other persons, your petitioner has devoted special attention to said questions, and the Court may avail itself of all possible sources of information in the adjudication of said questions.

Your Petitioner respectfully suggests and requests that, as a friend of the Court, we be permitted to file a brief (or make an oral argument) in said cause upon the questions (or upon some specific question) therein involved.

Dated January 30, 1951. [72]

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for the United
States as Amicus Curiae.

Request to File an Amicus Curiae Brief of the
United States of America Is Hereby Granted.

Dated January 30, 1951.

/s/ JAMES M. CARTER,
Judge, U. S. District
Court. [73]

[Title of District Court and Cause.]

BRIEF OF THE UNITED STATES
SUBMITTED AS AMICUS CURIAE

Interest of the United States

Because the suit involves the attempted application of state regulation and supervision to the operations of a Federal savings and loan association, the United States is vitally interested.

The concern of the United States is to avoid interference with its instrumentalities. The question whether Federal savings and loan associations are to continue to be supervised exclusively by the Home Loan Bank Board as the agency of the Federal Government designated by Congress has an important bearing on the operation of the financial institutions of the country and on [74] the effectuation of the objectives for which Federal savings and loan associations were created as Federal instrumentalities.

This brief does not concern itself with whether the California State Statutes were intended, as a matter of statutory interpretation, to be applicable to Federal savings and loan associations, although it seems fairly clear that they were not. Neither are we here concerned with the view that the proper Federal administrative authority, the Home Loan Bank Board, might take with respect to the practices of the Federal savings and loan associations of which the Banking Commissioner complains in this action.

Our position is that the United States through the Home Loan Bank Board has plenary authority over the entire field of supervision and regulation of Federal savings and loan associations to the exclusion of the state authorities.

The Complaint

The action, which was originally filed in the state courts of California and was removed to the Federal courts, seeks to recover from a Federal savings and loan association One Hundred Dollars (\$100) a day for each alleged violation of the California State Statutes and also asks for an injunction. The State complains that the Coast Federal Savings and Loan Association is not a bank as defined in Article 652, Section 2, Cal. Gen. Laws (now repealed; see, however, Section 102, Cal. Bank C.A.), does not have a permit from California or the United States to engage in "banking business," and uses the words "bank" and "savings" and otherwise advertises so as to leave the impression that it is engaged in the banking business, all of which are said to constitute violations of Sections 12 and 12a of said Article 652 (now repealed; see, however, Sections 1762, 1763, 3390-3393, 3395, Cal. Bank, C.A., and Ch. 755, Cal. Laws (1949)) and of Section 3392 of the Banking Code of the State of California. Said Sections 12 and 12a and said Section 3392 prohibit representation of itself as a banking institution by any person who has not received a certificate to do a banking business from the State Superintendent of Banks and require advertising matter of build-

ing and loan associations and savings and loan associations, not having in their corporate name [75] words clearly indicating the nature of their business, to state "this is a building and loan association" or "this is a savings and loan association" or words to that effect. This suit does not challenge the constitutionality of Section 5 of the Home Owners' Loan Act of 1933, as amended, and no sound basis for any such challenge exists. *Fahey v. Mallonee*, 332 U.S. 245; *First Federal Savings & Loan Assn. v. Loomis*, 97 F. 2d, 831 (C.A. 7); see *Smith v. Kansas City Title & T. Co.*, 255 U.S. 180.

For the following reasons the United States as amicus curiae respectfully submits that this action cannot be maintained without derogating from the Federal government and without depriving it of control over its instrumentalities.

Argument

I.

Plenary and Exclusive Supervision of Federal Savings and Loan Associations Is Validly Vested by Congress in the Home Loan Bank Board.

Federal savings and loan associations are created by the Home Loan Bank Board. Section 5, Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464. These associations are not chartered by Congress (in which respect they differ from national banks) or pursuant to any general incorporation statute (*Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 392), nor are their powers

granted by any state. Federal savings and loan associations are instrumentalities of the United States. *Federal Savings & Loan Ins. Corp. v. Kearney Trust Co.*, 151 F. 2d 720 (C.A. 8); *Waterbury Sav. Bank v. Danaher*, 128 Conn. 78, 20 A. 2d 455; *State v. Minnesota Federal Savings & Loan Assn.*, 218 Minn. 229, 15 N.W. 2d 568. The statutory purposes of Federal savings and loan associations are "to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes." The Board issues charters for these associations, "giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." The Board provides by rules and regulations for the organization, incorporation, examination, [76] operation, and regulation of Federal savings and loan associations, which name is prescribed by statute. Aside from a certain few specific prohibitions contained in the statute, such as those against the receipt of creditor deposits which are designed to preserve the mutuality of these institutions, and limitations on lending practices, the power of the Board is plenary within the general direction to give primary consideration "to the best practices of local mutual thrift and home-financing institutions in the United States." Section 5, Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464. No provision is made for sharing its authority as to these Federal instrumentalities and the embarrassments which would result from divided responsibilities are at least as great as those

in the labor field where the Supreme Court has time and time again held that within the area of its delegated responsibility the authority of the National Labor Relations Board is not only supreme but exclusive. See e.g., *Bethlehem Steel Co. v. New York Labor Rel. Bd.*, 330 U.S. 767. The conflict is not hypothetical but very real and results in division of authority and disciplinary action tending to diminish the resources of the institution available for the transaction of its business and the effectuation of the congressional purposes with the result of loss in the effectiveness of the institution as a Federal instrumentality.

II.

The Position of the Banking Commissioner in This Litigation, If Sustained, Would Seriously Impede and Possibly Prevent the Accomplishment of the Purposes of the Federal Savings and Loan System.

It is apparent from Section 5 of the Home Owners' Loan Act read as a whole, as well as from the authority granted in Section 5(a) to the Board to provide for the operation and regulation of Federal associations "under such rules and regulations as it may prescribe," and from the direction to the Board to give primary consideration to the best practices of such institutions in the United States, that a national system of uniformly operated savings institutions is contemplated. The Home Loan Bank Board as the Federal agency charged with its administration so interprets the statute. [77]

The Report of the Home Loan Bank Board for the Year Ending December 31, 1949, to the Congress of the United States states at p. 20: “* * * The underlying purpose of this legislation was to provide for adequate thrift and home financing facilities by creating local institutions throughout the country that would operate on a uniform plan incorporating the best practices and operating principles of savings institutions specializing in the financing of homes.” The Board is not required to trim the operations of Federal savings and loan associations to conform with the variegated and myriad requirements imposed by what local law regards as the closest analogue. In New England this might be mutual savings banks and cooperative banks; in California this might be mutual building and loan associations. It is the government’s view that these Federal savings and loan associations are *sui generis*, are governed by national law and are to be operated according to nation-wide standards and principles set out in the Act. To illustrate, the two best known types of local mutual thrift home-financing institutions operating in the United States at the time of the enactment of the Home Owners’ Loan Act, and accordingly the point of departure for Federal savings and loan associations, were building and loan associations and mutual savings banks. (1) The institutions that we have generally categorized as building and loan associations operate under different names in different parts of the country, among which names are cooperative banks, homestead associations, savings and loan associations,

and various combinations. Cf. 5A Ann. Laws Mass. Ch. 170; 6 La. Rev. Stat. 724. These have variant requirements and controls, in many cases derived from preconceptions prevalent in a particular area at the time of the enactment of state laws prior to the Federal statute of 1933. It cannot be doubted that at the time of the enactment of the Home Owners' Loan Act of 1933, the operating structures of these institutions varied as widely as their names. (2) The other type of mutual savings institution, the mutual savings bank, conforms to the original pattern of a savings institution operated by a disinterested self-perpetuating board of trustees for the benefit of persons assumed to be incapable of participating in its management but who receive the financial [78] benefits of its mutuality. *Huntington v. National Savings Bank*, 96 U.S. 388. From the very first the Home Loan Bank Board followed the practice of issuing uniform Federal savings and loan association charters throughout the United States which charters accordingly might conform to a greater or less extent to those of existing savings institutions of any type in any one state in which the Federals were operating. The uniform charter and bylaws for the entire country are prescribed by regulation in accordance with the statutory direction above discussed. 24 Code of Federal Regulations 144.1, 144.5.

The policy of uniform charters and bylaws has consistently been extended to uniform standards of supervision that are applied regardless of the state in which the home office of the particular institu-

tion happens to be located. On one of the most controversial questions involved in the supervision of Federal savings and loan associations, the Board observed thus:

“* * * [The Board] does not, however, accept the thesis that its judgments or authority are bound by State laws or by the policies of State supervisory authorities with respect to the creation and approval of branch organizations. In its interpretation of Federal statutes, the Board has formed the opinion that to the extent that Congress empowered it to charter Federal associations, it likewise, under the law and for the same reasons and with the same general limitations, gave the Board authority to sanction and approve the creation of branches.”

Report of the Home Loan Bank Board for the Year Ending December 31, 1948, p. 38.

From the national viewpoint there are obvious advantages to a uniform system of Federal savings and loan associations. An investor in Iowa relatively unschooled in banking law and practices knows substantially what interest he is acquiring when he places funds in a Federal savings and loan association in any other state. From the viewpoint of facilitating [79] supervision and regulation, and of influencing these institutions to perform their proper statutory functions and of avoiding conflict and divergent accounting practices, uniformity is an obvious aid.¹

¹Of course, regardless of its advantages, uniformity is prescribed by the Federal statutes.

The superimposition of state regulation on Federal savings and loan associations, devised, intended, and adapted for a particular form of state institution whether the particular model selected by the state for Federals operating in its territory happens to be one of the many building and loan types or the mutual savings bank type, is obviously incompatible with maintenance of a uniform Federal system and by its very nature a serious interference with the ability of the Board to accomplish its supervisory duties and of the instrumentality itself to perform its assigned functions.

For example, California undertakes in this litigation to prevent Federal savings and loan associations from giving the appearance of "banking institutions." In New York, however, all savings and loan associations are specifically stated to be "banking institutions." Vol. 4, Part 1, McKinney's Laws of New York, Section 2(11). In Massachusetts, such institutions are generally named "banks." 5A Ann. Laws Mass. Ch. 170. Federal savings and loan associations in New York, Massachusetts, and California, however, are the same, regardless of whether the state calls similar institutions "banking institutions." If Federal savings and loan associations are to be prohibited from advertising themselves to be "banking institutions," the prohibition must be by the Home Loan Bank Board, and not by any one state.

It is also true that Federal savings and loan associations through the country advertise that they receive "savings." This advertising is ap-

proved by the Home Loan Bank Board. California, by this litigation, would prohibit such advertising in that State. The Home Loan Bank Board is thus faced with the alternative, if it directs or permits Federal savings and loan associations in that State to comply with this prohibition, either to sacrifice national uniformity, or to forbid associations in the entire United States from advertising that they receive "savings." But the latter [80] course might so hamper their activities that the purposes of their creation would be frustrated. By way of contrast with the position of the State of California in this litigation, Vol. 4, Part 1, McKinney's Laws of New York, Section 258-1, provides:

"No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national

bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued.’²

It is fair to infer that, if Federal savings and loan associations had in 1934 been prevented from advertising that they receive “savings,” the United States Treasury would still be the principal owners of these associations. Unless they so advertise, they cannot successfully solicit their necessary [81] capital.³ As in other safety legislation, the Federal

²The application of this statute to national banks is contested in pending litigation in the New York state courts. *State of New York v. Franklin National Bank*, N.Y. Sup. Ct., *American Banker*, June 12, 1950, p. 1, col. 3; *American Banker*, June 26, 1950, p. 1, col. 2.

³In upholding the power of the Federal Reserve Board to authorize national banks to act as trustee, the Supreme Court in *First Nat. Bank v. Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 420, said in part:

“In *Osborn v. Bank of United States*, 9 Wheat. 738 * * * it was expressly held that the authority of Congress was to be ascertained by considering the bank as an entity possessing the rights and powers conferred upon it, and that the lawful power to create the bank and give it the attributes which were deemed essential could not be rendered unavailing by detaching particular powers and considering them isolatedly, and thus destroy the efficacy of the bank as a national instrument. The ruling in effect was that although a particular

government has occupied the field and has precluded the imposition of additional requirements however well motivated. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605.

Different regulations and different restrictions are applied to local mutual thrift and home-financing institutions in the several states. Some of these regulations may well be considered by other experts as unsafe. Requirements of one state may be the opposite of those of another or of those which the Federal Board deems desirable, subjecting Federal savings and loan associations to a cross-fire of conflicting requirements, [82] a matter of grave concern to the Federal Board whose instructions may be canceled or rendered nugatory in practical effect. Some states tend to encourage, others to discourage, the mutual or cooperative type of financial institutions, which policy may be reflected in statutes and regulations affecting all operations including advertising, in day to day rulings of state supervisors, and even in the state judiciary. Compliance by Federal savings and loan associations in any state with the requirements of the state authorities would make national supervision a practical impossibility. Even the imposi-

character of business might not be, when isolatedly considered, within the implied power of Congress, if such business was appropriate or relevant to the banking business, the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant, in the judgment of Congress, to make the business of the bank successful. * * *” (Emphasis supplied.)

tion of penalties by the state for violation of Federal regulations would seriously hamper the Federal system. First, only one authority can determine whether there has been a violation. Second, even if there is an admitted violation, the imposition of penalties is a matter of policy and judgment, and excess punishment for petty infringements of regulations, of a type bound to occur in any large institution, may well make normal operation an impossibility.

III.

The Interposition by the State Banking Commissioner in the Operations of Federal Savings and Loan Associations as Such, Including the Application of State Statutes and State Regulation, Is Unconstitutional.

We have seen that Federal savings and loan associations are validly created instrumentalities of the United States, and the Home Loan Bank Board has been granted a plenary and exclusive authority to provide in nationally uniform rules and regulations for their organization, incorporation, examination, operation, and regulation. To summarize, the position of the State Banking Commissioner in this litigation, if maintained, would (1) prevent the Home Loan Bank Board from carrying out its governmental function of providing for the uniform operation and regulation of Federal savings and loan associations throughout the United States, (2) prevent the Coast Federal Savings and Loan Association and other Federal savings and loan

associations in California from complying with the uniform regulations and supervisory directions of Federal authorities, and (3) otherwise [83] impede the operations of Federal savings and loan associations in California by the imposition of dual supervision, by superimposing and substituting the judgment of state authorities including the State Banking Commissioner, the state courts, and the state legislature on or for the judgment of the Federal government as to the proper operation of Federal savings and loan associations, and by prohibiting the use of means, including advertising methods, essential to the raising of capital necessary for the operations of these Federal instrumentalities. If these obstacles could be imposed by the state to the execution of Federal statutes and the operations of Federal instrumentalities, every state would have an independent veto power over each operation of the Federal government within its territory. But the supremacy clause of the Constitution removes all state obstacles to the performance by the Federal government of any of its functions and so modified "every power vested in subordinate governments as to exempt its own operations from their own influence." *McCulloch v. The State of Maryland, et al.*, 4 Wheat. 316, 427. This doctrine of Federal immunity, accepted in many decisions of the Supreme Court, is coextensive with the scope of Federal power, for every authorized activity of the United States is an exercise of its governmental power. *Graves v. New York*, 306 U.S. 466, 477; *Pittman v. Home Owners'*

Loan Corp., 308 U.S. 21, 32; Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 102.

Because the United States "may perform its functions without conforming to the police regulations of a state," it may construct a dam and reservoir in a state without securing approval of its plans and specifications by the state engineer (*Arizona v. California*, 283 U.S. 423, 451); and it may operate soldiers' homes without complying with state inspection or police regulations (*Ohio v. Thomas*, 173 U. S. 276). So, too, the driver of a mail truck for the Post Office Department cannot be required to comply with state driving license requirements (*Johnson v. Maryland*, 254 U.S. 51; cf. *Baltimore and A. R. Co. v. Lichtenberg*, 176 Md. 383, 4A 2d. 734, appeal dismissed, 308 U.S. 525), nor may Federal agents in a national forest and game preserve be subject to the hunting restrictions of the state in which [84] the preserve is located. *Hunt v. United States*, 278 U.S. 96.

In general "where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the legislation becomes inoperative and the federal legislation exclusive in its application." *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156. "The elementary principle that, under the Constitution, the authority of the government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable." *Northern P. R. Co. v. North Dakota*

ex rel., *Langer*, 250 U. S. 135, 150. States cannot by "taxation or otherwise, * * * retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v. The State of Maryland, et al.*, 4 Wheat. 316, 436. When Congress creates instrumentalities to execute its laws, "Congress has the power to protect the instrumentalities which it has constitutionally created." *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 102. By way of example, the Supreme Court has held that not even the prerogative of a state to control its own courts can be utilized to prevent the appointment of a national bank as executor under a will when competing trust companies are authorized to act in that capacity. *Missouri ex rel., Burnes Nat. Bank v. Duncan*, 265 U. S. 17. In *First Nat. Bank v. California*, 262 U. S. 366, the Supreme Court in holding the escheat of deposits of a solvent national bank invalid, said at 368-369:

"These banks are instrumentalities of the Federal government. Their contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation. But any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legisla-

tion [85] or impairs the efficiency of the bank to discharge the duties for which it was created. *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 283, 288, 290, 40 L. Ed. 700-703, 16 Sup. Ct. Rep. 502."

The congressional policy creating a uniform system of Federal savings and loan associations "cannot be overridden by the policy of the state." *Easton v. Iowa*, 188 U. S. 220, 232. While the field of national bank operations has not been so completely occupied by Federal legislation as that of Federal savings and loan association operations, the Supreme Court nevertheless said with respect to the National Bank Act (*ibid.* at 229) "That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states."

The principle that "the States can exercise no control over * * * [Federal instrumentalities], nor in anywise affect their operation, except in so far as Congress may see proper to permit" (*Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 34) is not limited in its application to any one department of the state government. "The State Court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. * * * We do not think such an element of weakness is to

be found in the Constitution. * * *” *Tennessee v. Davis* 100 U. S. 257, 263. To this same effect is *Van Reed v. People’s Nat. Bank*, 198 U. S. 554, holding that there could be no state court attachment of national banks, wherein the court said, at page 557:

“* * * National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit. * * *” [86]

Compare *Missouri ex rel., Burnes Nat. Bank v. Duncan*, *supra*.⁴

⁴It would seem that not only was the State Banking Commissioner without power to apply state regulatory statutes and his own decisions as to proper operations to the defendant Federal savings and loan association, but the state court was without jurisdiction to entertain the action. Since the state court had no jurisdiction, the Federal court acquired none on removal. *Minnesota v. United States*, 305 U. S. 382; *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U. S. 377; *Freeman v. Bee Machine Co.*, 319 U. S. 448. Unlike *First Nat. Bank v. Fellows ex rel., Union Trust Co.*, 244 U. S. 416, where quo warranto in a state court was held to be an appropriate procedure because the state statute allows national banks to act as trustee even in contravention of state law 12 U.S.C. 1464, makes no reference to state law.

Conclusion

For the foregoing reasons, the attempted regulation of Federal savings and loan institutions, if the California law may be construed so to provide, would be unconstitutional interference with the exclusive and plenary power of regulation conferred on the Home Loan Bank Board. The complaint fails to state a cause of action or claim upon which relief may [87] be granted, the state court had no jurisdiction, and this court acquired none on removal.

Respectfully submitted,

/s/ NEWELL A. CLAPP,

Acting Assistant Attorney
General.

/s/ ERNEST A. TOLIN,

United States Attorney, Attorneys for the United
States as Amicus Curiae.

Of Counsel

EDWARD H. HICKEY,

HUBERT H. MARGOLIES,
Attorneys, Department of
Justice.

KENNETH G. HEISLER,
General Counsel;

WILLIAM F. McKENNA,
Assistant General Counsel,
Home Loan Bank Board.

[Endorsed]: Filed January 30, 1951.

[Title of District Court and Cause.]

STIPULATION OF FACTS FOR THE PURPOSES OF TRIAL

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, Edmund G. Brown, Attorney General of the State of California, and Walter L. Bowers, Assistant Attorney General, and Bayard Rhone, Deputy Attorney General, for the plaintiff, and Messrs. Crail and Crail by Harry G. McMahon, Esq., and Frank P. Doherty, Esq., attorneys for the defendant, that the following stipulation of facts are agreed as facts to be admitted without objection as evidence for the purpose of trial.

Now, Therefore, It Is Stipulated That:

I.

That plaintiff Maurice C. Sparling is, and was at all times mentioned herein, the duly appointed, qualified, and acting Superintendent of Banks of the State of California. [89]

II.

Frank C. Mortimer is and was at all times mentioned herein duly appointed, qualified and acting Building and Loan Commissioner of the State of California and having jurisdiction of all state building and loan associations chartered and authorized by said State.

III.

The defendant, Coast Federal Savings and Loan Association, is and was at all times mentioned

herein a corporation organized under and pursuant to the provisions of the Acts of Congress of the United States of America, and the provisions of said Acts as set forth in 12 U.S. Code Annotated 1464. The said defendant at all times had its principal place of business in the County of Los Angeles, State of California, and at all times was subject to the jurisdiction, regulation and control of the Federal Home Loan Bank Board, as authorized by said Acts of Congress.

IV.

That the defendant is and was at all times mentioned herein a savings and loan association as defined and empowered by the aforesaid Acts of Congress; that the defendant does not have and has not had at any time mentioned herein any certificate from the Superintendent of Banks of the State of California and does not have and has not had at any time mentioned herein any authority, right or permit from, by or under the State of California or the United States of America to engage in or transact a banking business as defined by the laws of the State of California and of the United States of America, as distinguished from the transaction of business as a savings and loan association under said foregoing laws.

V.

That on or about November 1, 1948, and on each and every day thereafter up to on or about March 1, 1949, the defendant made use of office signs at

one of its places of business where it [90] transacted business in the County of Los Angeles, State of California, having words, as a part of said signs and used in such a juxtaposition as appear in Exhibit A, copies of which are attached to the complaint. That the overemphasis in said signs of the word "bank" was called to the attention of the defendant by the plaintiff and by a representative of the Federal Home Loan Bank Board, and the said signs as set forth in Exhibit A of said complaint were removed and the emphasis placed upon the word "bank" was discontinued, and the signs used by said defendant thereafter recited that defendant was a "Member of Federal Home Loan Bank" without emphasizing the word "bank."

VI.

That in the operation of defendant's business it publishes a house organ, namely, a publication that is distributed among the employees, customers and prospective customers, of the defendant, said publication being named and known as "Coast Federal's Challenger"; that said publication is made quarterly and was published at all times alleged in plaintiffs' complaint and is still being published, and had an average circulation of more than 54,000 copies. That the October, 1949, issue of said "Coast Federal's Challenger" is Exhibit A to defendant's answer on file herein; that on page 1 of said October, 1949, issue there appeared the following:

"Place Your Savings at Coast Federal * * *
For * * * Safety, with federal insurance up to

\$5,000 per account; For * * * Higher Return on Your Savings; 3% per annum is the current rate; For * * * Convenience, and friendly service; For * * * Availability—you can get your money when you want it. Accounts Opened by the 10th of the Month Earn from the 1st,” [91]

that on page three of said October, 1949, issue there appeared the following:

“Your Savings Account Opened by the 10th of the Month, Earns Interest from the 1st! Whee!”

and that on page four of said October, 1949, issue there appeared the following:

“Why I Hate Your Singing Commercial”
Winners * * * “As usual, our Committee-On-Deciding-on-Contest-Winners couldn’t make up its mind about which of the letters on the darned singing commercial was best—so instead of awarding one \$25 prize, we’re awarding six \$25 prizes! And only grim determination on the part of budget-balancing Controller Bob Souter kept them from sending \$25 to every one of the hundreds of letter-writers.

“Here are the winners: (wish we had space to print the whole of their very interesting letters).

“Mrs. Robert G. Hoyt, who complained because her baby’s first words were ‘Cos Fed saves mo’—instead of ‘Mama.’

“Mrs. Mable E. Smith, who made the con-

structive suggestion of a dignified slogan such as: 'Our Business Is Banking. Our Banking Is Business. We solicit your banking business.'

"Bob Downer of Laguna Beach, who made some valuable suggestions, and commented that 'there's no mention at all of the most important thing about Coast Federal—the friendly people. Most Banks and loan associations seem to regard you as a criminal if you have any money to deposit and a bum if you make a withdrawal or loan. You feel like you owe every clerk and the manager an apology every time you walk [92] in the door of those places. Two years ago I left Los Angeles, and I withdrew my savings from Coast Federal to buy a car and trailer, but I left a dollar there to keep my account open. The high Cost of Living hits me so hard that sometimes I wish I had that buck to spend, but it stays at Coast Federal just so I can say I'm a depositor. That's how much Coast Federal's friendly spirit means to me.'

"Carol M. Holt, for her poetic entry, which really rhymed and scanned, and also made good sense.

"Mrs. C. W. Cook—and we're writing to ask her if we may print her letter in its entirety—it's that worthwhile.

"Alice B. Pearce—who says she hates the commercial because it's 'such a catchy little tune' that it made her transfer her savings 'from one of those places that give you so

little interest you just know they are bored to carry the account,' to Coast Federal. She says, 'Now when I get a desire for a new hat or even a much needed suit, I can't get it. It was so easy before to get it; I wasn't getting any interest to speak of anyway. But now, oh, that interest! So I'll just brush up my old hat and suit and cuss the singing commercial, but that money stays right in Coast Federal.'

"Bob Souter points out that we haven't really quoted any of the uncomplimentary (sometimes vitriolic) things which were said about the singing commercial in these winning letters. Well, there were plenty of them—and we appreciate the helpful spirit in which they were written—and we've overwhelmed our singing-commercial-happy advertising man with your complaints; and thanks!" [93]

and that also on page four of said October, 1949, issue there appeared the following:

"Open Your Coast Federal Savings Account
Now! Coast Federal Savings and Loan Association"

The slogan of Mrs. Mable E. Smith, namely, "Our Business Is Banking, Our Banking Is Business. We solicit your banking business," was not otherwise published in any of the literature, publicity or advertisements of said defendant.

VII.

That on November 1, 1948, and on each and every

business day thereafter up to and including the commencement of this action, the Defendant solicited savings accounts from members of the public. When one of said members of the public opened a savings account with Defendant, that person received what is known as a savings account pass book. Entries in the pass book show, among other things, the balance of the savings account.

VIII.

That in the issue of the Challenger dated October 4, 1948, there appeared in the lefthand column of page three an article concerning the 9th and Hill location. Said page is reproduced as Exhibit A to this Stipulation.

IX.

That on or about January 4, 1949, in the Los Angeles Herald Express, there appeared an advertisement containing the words "How to open your savings account!" A photostat of the entirety of said advertisement is attached hereto as Exhibit B.

X.

That on or about November 1, 1948, and each and every day thereafter up to this date, the Defendant has from time to time advertised and referred to itself as "Coast Federal Savings" without using the balance of its corporate name, and without appending to such advertising matter any words to the effect that it is a [94] savings and loan association, and unless restrained will continue to do so.

XI.

That on or about December 27, 1948, in the Los Angeles Times, there appeared an advertisement inviting the public to the opening of Coast Federal Savings. A photostat of the entirety of said advertisement is attached hereto as Exhibit C.

Dated February 12, 1951. -

EDMUND G. BROWN,
Attorney General.

WALTER L. BOWERS,
Assistant Attorney General.

BAYARD RHONE,
Deputy Attorney General.

/s/ BAYARD RHONE,
Attorneys for Plaintiffs.

CRAIL AND CRAIL, and HARRY G. McMAHON; and FRANK P. DOHERTY,

/s/ HARRY G. McMAHON,
Attorneys for Defendant. [95]

COAST FEDERAL OPENS OFFICES AT NINTH AND HILL



Ninth and Hill Building

PRIZE CONTEST!

We want a jingle which will associate "Coast Federal" or "Coast Federal Savings" and "Ninth and Hill" in folks' minds; something like:

"Coast Federal
Ninth Street at Hill."

only better.

So, we're gonna have a contest!

RULES: 1. Contest is open to everybody—employees, customers, Baptists, mothers-in-law, nudists, anybody.

2. Prize for any jingle used in any of our advertising—\$50.00.

3. If two or more people submit the same jingle—the first one received by us will get the prize.

4. No weight given to neatness of entry—write it on any old postcard, back of an envelope, income tax blank, old shirt-front—just so we can read it.

A COAST FEDERAL HOME LOAN

is your insurance for peace of mind. Let us worry about taxes, insurance, eyebrows and stuff—all you have to do is find the house, (and make the monthly payments). You'll like our friendly, courteous, helpful service.

WANT ADS

Note to anybody who came in late: This is a column run just for the convenience of Coast Fed's wonderful customers. It's for free. Please forgive us if you send in an ad and it isn't printed; we get more ads than we have room for unless we just convert the *Challenger* into a Want Ad paper, which would please some few of you maybe, but we think most folks like to read about what Coast Federal is doing, and we know from your letters that many of you read the *Woke* column first of all, and then us employees like to see our news in print, and then we have to get in a few plugs for Coast Federal, too. Also, please pardon the occasional mistakes in the Want Ads—honest, we try terribly hard to get everything right—we have about ten different people proofread the stuff—but once in a while our greenhorns slip in "SI" when it should be "\$100," or changes one numeral in a phone number and then, oh, my! what happens to us—shouldn't happen to a dog!

Please keep your ads short and please don't send in an ad without a phone number. Also, we have a policy not to print ads about real estate for sale, because there are just too darned many of them.

Now, after all those "don'ts," we want to say: Thanks for being so nice about things. Your friendly coxey keeps us trying on the Want Ads column.

WE ETO

For SALE: Guitar, Martin 00028, fast action finger board, Rosewood box, plywood case. AN 26189.

For SALE: Ping Pong Table, 5-ply, like new, also children's books. TH 6459

For SALE: An improved adjustable dress form, \$10. 676 Shatto Place, Apt. 310, evenings or Sunday afternoon.

For SALE: Leaving for Florida, will sacrifice complete lady's wardrobe of elegant clothes, size 16, many pairs of famous make shoes, size 7A and B, also some house furnishings, Grey Persian cape, latest style, never worn, will sacrifice. EX 3007.

For SALE: New tablecloth, Pineapple pattern, extra color, hand-embroidered, 20x96 inches. AN 12910.

If you're interested in living next door to Frank Sinatra, call up Guy Anderson at Palm Springs 2064 or 6553, or Irene Anderson evenings at ME 8386. They've got a lot for sale next door to Frankie's Palm Springs home, but we can't print their ad on account of our policy about real estate ads.)

For SALE: Linen tablecloths. EX 3508.

A clean, dependable elderly man would help with household or miscellaneous duties in exchange for a room. Nathan Rubin, 2829 Boulevard St. L.A. 33.

For SALE: 40-acre farm out here in Arkansas, 5-room house, good water on the porch which is part of the house, 3 good wells on the place, 2 barns, 1 chicken house, 12 apple trees, 12 peach trees, 20 acres in corn that is fine, 20 acres in alfalfa, late potatoes and garden. One good team of mules, wagon harness, 1 good mow machine. All implements (couldn't figure out that word, Mrs. Smith) all household goods, 10 fine cows, 200 young fries and old hens, and a big hay meadow, 3 acres of good merchantable timber such as Oak, Gum, Walnut. All this for \$9000! It is a fine family home, close to school, churches, 6 miles from Batesville, Arkansas, which is a good live town. \$5000 cash will handle. Olive F. Smith, R. 2, Batesville, Arkansas.

Thanks for writing to us, Mrs. Smith. It's interesting to hear from somebody away out there, and we'll let you sell your farm to some Coast Federal family who feel like getting back to the simple life. In fact, we had trouble wearing shoes ourselves, ever since we read your letter. Sure sounds like a nice place.)

For SALE: Buck Gas Range, ivory, green trim, left hand oven, Thermostat. Good condition. Price \$15.00. WY 0748.

For SALE: Someone Hearing Aid, beautiful sol. mfg. dining room set, 18th cent. NO 21432.

For SALE: Singer Sewing Machine \$30; Mahogany dresser \$15; handkerchiefs 9x12 \$1; coil bed springs \$5; Carl's new skates \$3; Schick electric razor new, \$10; Jodhion riding shoes size 8, \$3; Riding pants size 18, \$5; Garrison cap size 7 1/2. WA 0628.

For SALE: Wooden white enameled single bed, springs, mattress, all \$15, good condition. Hot automatic water heater suitable for laundry room or mountain cabin, \$17. ME 4211, Est 2563 days; or GE 9579 evenings. Anne Keeler.

EXHIBIT B



HOW TO OPEN YOUR SAVINGS ACCOUNT!

1 Bring your savings to Coast Federal

2 Ask for Rae Smith, who will help
you get your Federally Insured Account

3 THIS IS THE PASSBOOK which entitles you to
add to your account or take your money out

307 West 8th Street • 2nd Floor

Ninth & Hill Streets • Ground Floor

TUcker 1351 • Open Mondays until 9 p. m.

L A R G E S T I N T H E W E S T

COAST FEDERAL SAVINGS

JOE CRAIL, PRESIDENT

Handwritten: 1/2 - 1/2 1/2

You are invited to
the opening of
COAST FEDERAL SAVINGS
Ninth and Hill Office
On Monday, January Third
from 2 to 3



Build your savings
account with a
**COAST FEDERAL
SAVINGS BANK**
With your savings account
you will receive a Coast
Federal Savings Bank...
an exact copy of Coast
Federal's Ninth & Hill office

2 CONVENIENT LOCATIONS:
222 West 22d Street - 2nd Floor Ninth & Hill Streets - Ground Floor
LARGEST IN THE WEST

98

COAST FEDERAL SAVINGS



[Title of District Court and Cause.]

OPINION

Appearances:

For Plaintiffs:

EDMUND G. BROWN,
Attorney General,

WALTER S. BOWERS,
Asst. Attorney General,

BAYARD RHONE,
Deputy Attorney General.

For Defendant:

CRAIL and CRAIL,
HARRY C. McMAHON, of Counsel and
FRANK P. DOHERTY.

For United States, as amicus curiae.

NEWELL A. CLAPP,
Acting Asst. Attorney General,

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING,
Asst. United States Attorney,

REUBEN ROSENSWEIG,
Asst. United States Attorney,

EDWARD H. HICKEY, and

HUBERT H. MARGOLIS,

Attorneys, Department of Justice, and

KENNETH G. HEISLER,

General Counsel, and

WILLIAM F. McKENNA,

Asst. General Counsel,

Home Loan Bank Board, of Counsel.

For the California Savings & Loan League,
as amicus curiae.

SHEPPARD, MULLIN, RICHTER &
BALTHIS,

FRANK S. BALTHIS, and

JAMES C. SHEPPARD, of Counsel.

James M. Carter, District Judge.

This is an action for injunction and recovery of statutory penalties, in which the plaintiffs contend that defendant, a Federal savings and loan association, solicited and received deposits, representing itself to be a banking institution, and transacted its business in the manner of a savings bank, in violation of California state statutes and without authority.¹

The action was commenced in the State court and removed to the District Court. Due to the importance of the questions involved, leave was granted to the United States and to the California Savings & Loan League to appear as amici curiae.

The Facts

Defendant was chartered by the Home Loan Bank Board (hereafter referred to as the Board) under Sec 5(a) of the Home Owners' Loan Act of 1933, as amended, Sec. 1464(a), Title 12, U.S.C.A., its principal place of business being in Los Angeles. It has not received a certificate from the State Superintendent of Banks (hereafter referred to as the Superintendent) to do a banking business, nor has it been authorized by the United States to transact business as a National Bank.

Defendant issued but two types of accounts: an "investment share account," in multiples of \$100, and a "savings share account," in any amount. Under normal conditions,^{1a} holders of savings share accounts may add to or withdraw funds from the account, at will. Every person opening an [100] account is issued a membership certificate and becomes a member of defendant, entitled to one vote at all membership meetings for every \$100 or fraction, on deposit, with a maximum of 50 votes. Each holder of a savings share account is given a pass book. Subject to limitations prescribed by the Home Loan Bank Board, defendant's directors fix the dividend rate, semi-annually, to apply for the next succeeding half year; otherwise the association does not agree to pay a fixed rate of earnings upon its accounts.

The charter of defendant, implemented by rules and regulations of the Board, expressly authorizes defendant to make loans on homes, within pre-

scribed limits, if secured by a first lien; each such borrower becomes a member of defendant, with the right to cast one vote at membership meetings.

No evidence was offered which would support, a finding that defendant was actually transacting its business other than strictly within the limited perimeter of its expressly authorized field. The gravamen of the complaint is that through signs and other means of advertising, defendant has transacted business in the manner of a bank and has held itself out as a bank or savings bank, and has led the public to believe that it was such a bank, without authority and in violation of state statutes. Plaintiffs further allege that defendant, unless restrained, will continue such advertising, and seek injunctive relief, as well as recovery of the \$100-a-day statutory penalty.

In its various types of advertising, defendant uses a part of its corporate name, viz: "Coast Federal Savings." It uses such phrases as "Your savings account opened by the 10th earns interest from the 1st," "Open your Coast Federal Savings account, now," "Place your savings at Coast Federal," and "You can get your money when you want it." [101]

Through emphasis upon certain words used in adjoining window signs, the very myopic would read, from a distance, "Coast Federal Savings Bank."² Supervisory personnel of the Board saw such signs frequently. They were removed at the request of the Board about seven months before this action was commenced, but only after the Board

received complaints, including those of the Superintendent. Thereafter, defendant's signs recited that it was a "Member of Federal Home Loan Bank," without emphasizing the word "bank."

In 1938, and prior to the time when, as alleged in the complaint, defendant commenced to use the advertising methods complained of, the Federal Savings and Loan Insurance Corporation (a federal instrumentality which insures deposits at Federal Savings and Loan Associations) published a handbook^{2a} dealing with approved and recommended advertising by insured institutions, including federal savings and loan associations. The handbook approved the use of such phrases as "Accounts Federally Insured," "Insured savings accounts," "Save where savings are insured" and "Availability of funds." It stated that earnings distributed should be referred to as "dividends" and not as "interest." One of the advertisements used by the defendant stated "earns interest from the 1st." This statement was not within the letter or spirit of one of the regulations.³

At no time did plaintiffs request or petition the Board for a hearing or other administrative action concerning the defendant, with the exception of the informal complaints, above mentioned, as to the signs.

The answer asserts that (1) the complaint fails to state a justiciable claim; (2) the state statutes relied upon by plaintiffs are inapplicable; (3) defendant is an [102] instrumentality and agency of the United States; (4) its acts were done by virtue

of and under the authority of the United States; (5) plaintiffs have not resorted to or exhausted administrative remedies provided by the rules and regulations of the Board; and (6) the public has not been misled. Additionally, defendant and amici curiae urge that (7) primary jurisdiction lies with the Home Loan Bank Board, (8) the state courts did not have jurisdiction over the subject matter of this action, and, finally, (9) that this court is likewise without such jurisdiction.

The Questions for Determination

Four questions are presented: (1) Whether primary jurisdiction over the subject matter lies with the Home Loan Bank Board, or in the state courts; (2) the effect of the failure of plaintiffs to exhaust administrative remedies; (3) if the state court was without jurisdiction over the subject matter, whether this court is also without jurisdiction thereof; finally (4), whether the state regulatory statutes which plaintiffs seek to invoke, are valid.

The Law

I.

Defendant is a Federal savings and loan association, organized and chartered by the Home Loan Bank Board. Sec. 5, Home Owners' Loan Act of 1933, as amended; Sec. 1464, Title 12, U.S.C.A. It is conceded that such an association is an instrumentality and agency of the United States.⁴

Federal savings and loan associations are created

“to provide local mutual thrift associations in which people may invest their funds and in order to provide for the financing of homes.” Sec. 1464(a), *Ibid.* The Board issues charters for these associations, “giving primary consideration to the [103] best practices of local mutual and home-financing institutions in the United States.” Sec. 1464(a), *Ibid.* *North Arlington Nat. Bank v. Kearney Fed. Sav. & Loan Assn.*, 3 Cir., 187 F.(2d) 564 (1951).

Congress expressly delegated the duty and authority to the Board to make policy, including the power to make rules and regulations for the organization, incorporation, examination, operation, supervision and regulation of such associations, which delegation of authority is constitutional. *Fahey v. Mallonee*, 332 U.S. 245, 67 S. Ct. 1551 (1947). No provision is made for sharing the Board’s delegated authority with state regulatory or supervisory agencies. *North Arlington Nat. Bank v. Kearney Fed. Sav. & Loan Assn.*, *supra*. *First Fed. Sav. & Loan Assn. v. Loomis*, *supra*, note 4.

The Board has adopted comprehensive rules and regulations concerning the powers and operations of every Federal savings and loan association from its cradle to its corporate grave. Title 24, Code of Federal Regulations, 1949 Ed. Ch. I, sub-chapter C, published under authority of Secs. 311(d) and 311(a), Title 44, U.S.C.A. and Ex. O. No. 9931, Feb. 4, 1948, 13 F.R. 519. These rules and regulations have the force and effect of law, and are noticed judicially. Secs. 301-314, Title 44, U.S.C.A.; *Community Fed. Sav. & Loan Assn. v. Fields*, 1942, 128

F. (2d) 705; *H.O.L.C. v. Gordon*, 36 Cal. App. 2d. 189, 97 P.2d 845 (1939); *Standard Oil Co v. U.S.* 9 Cir. 107 F. (2d) 402 (1939).

Sec. 142.2 of the Regulations, 14 F.R. 5664, provides, in part: "The Board may order a hearing in connection with the consideration of any matter arising under any provision of the rules and regulations . . . whether or not any request therefor has been made by any person." The Board, in adopting that section, expressly found that its adoption [104] would tend "to expedite the public business and simplify the operation of the regulations." F.R. Doc. 49-7437, Sept. 14, 1949. (24 C.F.R., 1949 Supp., 142.2).

Sec. 146.1 authorizes the Board to appoint a conservator or receiver for a Federal savings and loan association if the Board finds that the association is conducting its business in an unlawful or unauthorized manner, is pursuing a course that is jeopardizing or injurious to the interests of its members, or the public, or has refused or failed to observe a lawful order of the Board. It is clear that if the Board determines that defendant's advertising methods violate Sec. 161.7(e) (note 3 herein) or that it is carrying on the business of a bank, it has plenary power to correct any improper or unlawful practices. Sec. 1464(a), Title 12, U.S.C.A. The functions and powers of the Board do not end with the promulgation of rules. Sec. 1464(b), *Ibid*.

It is held in *Trans-Pacific Airlines v. Hawaiian Airlines*, 9 Cir., 174 F. (2d) 63 (1949) at page 66, that where uniformity of interpretation of rules and

consistency in application, in view of an overall policy, is compelled by legislative mandate, then primary jurisdiction is in the administrative body and not in the courts. *Aircraft, etc., Corp. v. Hirsch*, 331 U.S. 752, 67 S.Ct. 1493 (1947).⁵

We hold that the Home Loan Bank Board had and still has primary jurisdiction over the subject matter of this action.

II.

The doctrine is also well settled that no one is entitled to judicial relief until available administrative remedies have been exhausted.

As stated by the late Justice Rutledge, in *Aircraft & Diesel Equipt. Corp. v. Hirsch*, 331 U. S. 752, at p. 767, [105] 67 S. Ct. 1493, 1500 (1947), the doctrine of exhaustion of administrative remedies is one "of pursuing them to their appropriate conclusion, and, correlatively, of awaiting their final outcome before seeking judicial intervention. The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision, or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings."

The courts should not assume in advance that an administrative hearing will not be fairly conducted. *Fahey v. Mallonee*, *supra*. The doctrine cannot be circumvented by asserting that the Board lacks power or jurisdiction over the subject matter, since no one is entitled to judicial relief for a supposed

or threatened injury until all available administrative remedies are actually exhausted. *Myers v. Bethlehem Shipbuilding Co.* 303 U. S. 41, 58 S. Ct. 459 (1938); *Gates v. Wood*, 4 Cir. 169 F. (2d) 440, 442-443 (1948).

The Courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. Congress, which creates and sustains federal administrative agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts with administrative remedies and their exhaustion is not conducive to the development of habits of responsibility in administrative agencies. *F.C.C. v. Pottsville Broadcasting Co.* 309 U. S. 134, 146, 60 S. Ct. 437, 443 (1940); *Hart v. Landis*, 103 A.C.A. 338, 229 P. 2d 380 (1951).

Congress need not supply an administrative agency with a specific formula for its guidance in a field, as here, [106] where flexibility and the adaptation, by the Home Loan Bank Board, of the policy of Congress to infinitely variable conditions, constitute the essence of the program. *Lichter v. U.S.* 334 U.S. 742, 785, 68 S. Ct. 1294, 1316 (1948); *Mallonee v. Fahey*, *supra*, Sec. 1464, Title 12, U.S.C.A.; *Trans-Pacific Airlines v. Hawaiian Airlines*, 9 Cir., *supra*.

It is also clear that this court lacks power to grant injunctive relief for a supposed or threatened injury before administrative remedies have been exhausted. *Mallonee v. Fahey*, *supra*. *Macauley v.*

Waterman S.S. Co., 327 U.S. 540, 543-544, 66 S. Ct. 712, 714 (1946).

Likewise, whether or not plaintiffs have a right to judicial review, after exhausting administrative remedies, is a matter with which this court is not presently concerned. *Fahey v. Mallonee*, supra.⁶

Finally, whether or not there exists a legal impediment of an administrative nature to the exercise of jurisdiction by the Board, is an issue, primarily, for the Board's determination, which is not subject to review until final action is taken by it. *Bland Lbr. Co. v. N.L.R.B.*, 5 Cir. 177 F. (2d) 555 (1949).

We hold that the state court had no jurisdiction of the subject matter.

III.

If, as we have held, the state court was without jurisdiction of the subject matter, then the District Court could not acquire jurisdiction by the removal. *Lambert Run Coal Co. v. B. & O. Ry. Co.*, 258 U.S. 377, 382, 42 S. Ct. 349, 351 (1922). *Freeman v. Bee Machine Co.*, 319 U.S. 448, 449, 63 S. Ct. 1146, 1147 (1943). *Minnesota v. U.S.*, 305 U.S. 382, 389, 59 S. Ct. 292, 295 (1939). [107]

IV.

In *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 773, 774, 67 S. Ct. 1026, 1030 (1947), the Court states: "When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere

fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. [Cases cited.] In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the State may be exercised. [Cases cited.] But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency." *Motor Coach Employees v. Wisconsin*, 340 U.S. 383, 71 S. Ct. 359.

Not only does the act of Congress which authorized the creation, operation and supervision of federal savings and loan associations by the Home Loan Bank Board, embrace the entire field, but the comprehensive rules and regulations adopted by the Board clearly meet the test of covering the subject matter of the statute. Congress has the power to protect the instrumentalities which it has created. U.S. Constitution, Art. I, sec. 8, cl. 18, *U.S.C.A. Federal Land Bank v. Bismarck Lbr. Co.*, 314 U.S. 95, 62 S.Ct. 1 (1941). It seems [108] clear that Congress has preempted the field, making invalid the state statutes plaintiffs rely upon (note 1) when attempted to be invoked against a Fed-

eral savings and loan association. U.S. Constitution, Art. VI, cl. 2, U.S.C.A. First Fed. Sav. & Loan Assn. v. Martin, *supra*.

Plaintiffs point to decisions⁷ holding that although Federal savings and loan associations are instrumentalities of the United States, they are not exempt from state taxation, and urge that the courts have thereby recognized that such associations are subject to regulatory state statutes. However, Sec. 1464(h) Title 12, U.S.C.A., expressly permits state taxation so long as the tax imposed is not "greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

The further contention is made that federal instrumentalities are subject to state laws unless those laws infringe on the national law or upon the functions of the agency, and rely upon decisions concerning National banks, principally *Anderson Nat'l. Bank v. Lueckett*, 321 U.S. 233 (1944) 64 S.Ct. 599. The cited decision held, in effect, that a state statute relating to escheat of inactive accounts was valid, since it concerned the debtor-creditor relationship of a bank with its depositors, and national law had not attempted to enter that field.

As stated in *Eddy v. Home Federal Sav. & Loan Assn.* 60 Cal. App. 2d 42, 140 P 2d 156: "Further, a savings and loan association organized under the Home Owners Loan Act is not a national bank, and the powers and duties of the two materially differ." As to national banks, Congress expressly left open a field for state regulation and the appli-

cation of state laws; but as to federal savings and loan associations, [109] Congress made plenary, preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for state supervision.⁸

Independent research discloses a decision by an intermediary appellate state court which seems to support the contentions of plaintiffs. In *re* Baldwinsville Federal Sav. & Loan Assn. 268 App. Div. 414, 1024, 51 N.Y. Supp. 2d 816 (1944). The court there held that a state statute, providing a summary remedy for the determination of the validity of an election of directors was valid as not interfering with the purposes of the creation of the association, destroying its efficiency or conflicting with paramount federal law.⁹ The court found that the association was a domestic corporation, and hence amenable to state law.¹⁰ As said by that court, on page 819, 51 N.Y.S. 2d: "The record does not disclose whether any rules or regulations, other than the charter, were prescribed for this association by the Board." But under Rules 148.1 and 149.2, if the Board found that election of directors was held contrary to the prescribed bylaws of an association and Roberts' Rules of Order, it could appoint a conservator, although the association was financially sound, and order a new election, to be supervised by a representative of the Board. Nor did the New York court mention the doctrine of exhaustion of administrative remedies.

The Baldwinsville case, which we decline to follow, illustrates the "disparities, confusions and

conflicts which would follow if the Government's general authority were subject to local controls." U.S. v. Allegheny County, 322 U.S. 174, at 183, 64 S. Ct. 908, at 913 (1944). The congressional mandate for uniformity would be destroyed if these associations were subject to federal control, plus concurrent state control, which latter control might vary in every one of the [110] forty-eight states.

To put it charitably, the Board may have been lackadaisical in the exercise of its plenary powers but this does not, per se, breathe validity into state regulatory statutes within a field preempted by the Federal government. *Bethlehem Steel Co. vs. State Labor Board*, supra. The Board possesses the power to correct the matters complained of by the plaintiff by the enforcement of its own regulations.

We hold that the state statutes which plaintiffs seek to enforce are invalid, as applied to this defendant.

V.

Since the statutes upon which the complaint is based are invalid as applied to this defendant, a federal instrumentality, the complaint fails to state a claim upon which relief may be granted. We have also held that plaintiffs have not exhausted available administrative remedies, and that primary jurisdiction of the subject matter is in the Home Loan Bank Board. Likewise, we have held that the state court had no jurisdiction over the subject matter of the action, and, hence, this court has none. Under all the circumstances, the action should be dismissed. *Aircraft, etc., Corp. v. Hirsch*, supra.

Armour & Co. v. Alton Ry. Co. 312 U.S. 195, 61 S.Ct. 498 (1941); Jones v. Brush, 9 Cir. 143 F. (2d) 733 (1944).

Defendant will prepare a judgment of dismissal, within the time provided by the rules of this court. Such judgment shall be without prejudice to the right of plaintiffs to pursue and exhaust administrative remedies. [111]

Footnotes

¹Sec. 102, Banking Code (formerly Sec. 2, Act 652, Calif. Genl. Laws), defines the word "bank" as any incorporate banking institution which shall have been incorporated to conduct the business of receiving money on deposit; "the soliciting, receiving or accepting of money or its equivalent on deposit as a regular business shall be deemed to be doing a commercial or savings bank business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass-book, a note, a receipt or other writing . . . It shall be unlawful for any corporation . . . to engage in or transact a banking business within this State except by means of a corporation duly organized for such purpose."

Sec. 3390, Banking Code (formerly part of Sec. 12, Act 652) provides that no person, without prior authority of the superintendent shall solicit or receive deposits "or transact business in the way or manner of a commercial (or) savings bank."

Sec. 3391, Banking Code, (formerly part of Sec. 12, Act 652) provides that no person, unless authorized by the Superintendent to engage in the banking business, shall use words in any advertisement or sign indicating that it receives deposits or that such business is the business of a commercial or savings bank, or, without express statutory authority, transact business in any manner as to lead the public to believe that its business is that of a bank.

Sec. 3393, Banking Code, (formerly part of Sec. 12, Act 652): "Any building and loan association

may issue shares and investment certificates and do such other [112] business as may be authorized by the laws of the State relating to building and loan associations, but no building and loan association shall advertise or hold itself out to the public as a savings bank."

Sec. 3395, Banking Code, (formerly part of Sec. 12, Act. 652): "Any person . . . violating any provisions of the foregoing sections . . . shall be liable to the people of the State in the amount of \$100 a day . . . during which such violation continues. Any court of competent jurisdiction in a proceeding brought by the superintendent may enjoin any persons from using words . . . or from transacting business in violation of this code or in such manner as to lead the public to believe that its business is that of a bank, commercial bank (or) savings bank."

^{1a}Sec. 11 of the defendant's charter concerning "Redemption" and Sec. 12 concerning "Repurchase" contain standard provisions which a Federal Savings and Loan Association may insist on in connection with withdrawals.

²Four adjoining windows bore the following signs, respectively: "Coast Federal," "Federal insurance," "Savings accounts," and "Member of Federal Home Loan Bank"; the emphasized words appeared in much larger lettering, either above or below the other word or words on each window.

^{2a}"Suggestions for Federal Savings and Loan Association in giving information to the public."

³Sec. 161.7(e): Regulations Relating to Housing and Housing Credit (24 C.F.R. 1949 Ed., Sec. 161.7(e). No association shall use advertising (whether printed, radio, display or of any other nature), or make any representation which is inaccurate in any [113] particular, or which in any way misrepresents its services, contracts, investments or financial condition. [The Board, by Sec. 141.5 of its Regulations incorporated by reference

various matters published in the Federal Register, concerning the management, supervision and control of federal savings and loan associations.]

⁴The concession must be made. *Federal Savings & Loan Ins. Corp. v. Kearney Trust Co.*, 8 Cir. 151 F. (2d) 720. *First Fed. Sav. & Loan Assn. v. Danaher*, 128 Conn. 78, 20 A2d 455, 463-464 (1941). *State v. Minnesota Fed. Sav. & Loan Assn.*, 218 Minn. 229, 15 NW 2d 568 (1944); *First Fed. Sav. & Loan Assn. v. Loomis*, 7 Cir. 97 F. (2d) 831, 121 A.L.R. 99.

⁵See also, "Doctrine of Primary Administrative Jurisdiction," 42 Am. Jur. 698, Sec. 254, et seq.

⁶See *Willapoint Oysters, Inc., v. Ewing*, 9 Cir. 174 F. (2d) 676, cert. den. 338 U.S. 860, reh. den. 339 U.S. 945; and Sec. 1009, Title 5, U.S.C.A.

⁷*State v. Minnesota Fed. Sav. & Loan Assn.*, 218 Minn. 229, 15 NW 2d 568, 573; *First Fed. Sav. & Loan Assn. v. Danaher*, supra; *First Fed. Sav. & Loan Assn. v. Johnson*, 49 Cal. App. 2d 465, 122 P 2d 84 (1942).

⁸See Deering's (Calif.) Gen'l Laws, Act 986, Secs. 1.02 and 12.11, 3d para., and Act 988, which exclude Federal savings and loan associations from control by the State Building and Loan Commissioner. [114]

⁹The New York statute is similar to Secs. 2236-2238, Calif. Corp. Code.

¹⁰Civ. Pr. Act Sec. 7, sub. 7: "A 'domestic corporation' is a corporation created under laws of this state or located in this state and created by or under the laws of the United States." Defendant, here, is not a "domestic" corporation under the laws of California. Sec. 106, Corp. Code.

[Endorsed]: Filed June 21, 1951. [115]

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 21st day of June in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER

The Court having taken this cause under submission after trial, and the cause having been duly considered, the Court now hands down its Opinion, which is filed herein by the Clerk; and, pursuant to said Opinion

It Is Ordered that the above-entitled action be dismissed, and counsel for defendant is directed to prepare and present findings of fact, conclusions of law and judgment of dismissal pursuant to local Rule 7, within ten days. [116]

[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

The above-entitled cause came on regularly for pretrial hearing on February 23, 1950, and again on November 15, 1950, and came on regularly for trial on February 12, 1951, before the Court sitting without a jury, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises now makes its findings of fact and conclusions of law. Although the Court orders the action dismissed, the Court having tried the case on the merits, makes findings of fact and conclusions of law for consideration of the appellate court in the event of an appeal.

Findings of Fact**I.**

Plaintiff Maurice C. Sparling is, and was at all times mentioned in the complaint, the duly appointed, qualified, and acting Superintendent of Banks of the State of California. [117]

II.

The defendant Coast Federal Savings and Loan Association is and was at all times mentioned in the complaint a corporation organized under and pursuant to the provisions of the Acts of Congress of the United States of America, and the provisions

of said Acts as set forth in 12 U. S. Code Annotated 1464. The defendant at all times had its principal place of business in the County of Los Angeles, State of California, and at all times was subject to the jurisdiction, regulation and control of the Home Loan Bank Board, as authorized by said Acts of Congress.

III.

The defendant is and was at all times mentioned in the complaint a savings and loan association as defined and empowered by the aforesaid Acts of Congress; that the defendant does not have and has not had at any time mentioned in the complaint any certificate from the Superintendent of Banks of the State of California and does not have and has not had at any time mentioned in the complaint any authority, right or permit from, by or under the State of California or the United States of America to engage in or transact a banking business as defined by the laws of the State of California and of the United States of America, as distinguished from the transaction of business as a savings and loan association under said foregoing laws and the rules and regulations of the Home Loan Bank Board.

IV.

Defendant has not transacted any business other than strictly within the limited perimeter of its expressly authorized field. Although the defendant has done the things which are shown in the stipulation of facts, in so doing it has conducted exactly

the type of business contemplated by the Federal statute and rules and regulations under which it was organized and operates. [118]

V.

Defendant has conducted its business as a federal savings and loan association in the manner authorized by the said Acts of Congress and the rules and regulations of the Home Loan Bank Board and has solicited and received from members of the public moneys for savings as authorized and contemplated by the said Acts of Congress and said rules and regulations of said Board. The defendant has not solicited nor has it received moneys from the public as deposits within the meaning of that word as used by 12 U.S.C.A. 1464b. Defendant has not solicited nor received savings nor transacted any business in the way or manner of a bank or savings bank or in such a way or manner as to lead the public to believe that its business was or is that of a bank or savings bank, except as defendant has solicited and received savings and done business in the way and manner of a federal savings and loan association and in the way and manner authorized by federal statutes or regulations; the extent to which the way and manner of business of a federal savings and loan association coincides with the way and manner of business of a bank or savings bank this Court does not decide.

VI.

The defendant is a member of the Federal Home

Loan Bank. Defendant has in its advertisements stated it was a member of said Bank. Defendant has not advertised nor publicized nor transacted any business nor solicited any business as a bank or as conducting a banking business or maintaining or operating a banking office; nor has defendant represented, indicated or held itself out to the public or otherwise as a bank or as transacting a banking business or maintaining a banking office; nor has defendant done any act or thing which would indicate or lead its customers or the members of the public to believe that the defendant was engaged in or conducting any other business than that of a federal savings and loan [119] association as authorized by the aforesaid Acts of Congress and rules and regulations of said Home Loan Bank Board.

VII.

In the course of the transaction of its business the defendant has used certain signs, advertising, and publicity for the purpose of calling to the attention of the public the type and manner of savings and loan business it was conducting. Said signs, advertising, and other publicity used by the said defendant was in connection with its federal savings and loan business and was done in good faith. Said signs, advertising, and publicity in no way misled or deceived the members of the public in inducing or causing any of them to patronize the business of defendant as a bank or as an institution conducting a banking business or maintain-

ing a banking office. The use of said signs, advertising, and publicity was not done or performed in a way or manner as to lead or for the purpose or with the intent of leading, nor did the same indicate that or lead any of the public to believe that defendant was a bank or that defendant's business was that of a bank or of a savings bank or that defendant was engaged in or transacting a banking business, or that defendant was authorized or empowered to engage in or transact a banking business, or that defendant was maintaining a banking office. There was no evidence offered or introduced by the plaintiff that any member of the public was misled or deceived as a result of the signs, publicity or advertising matter used by the defendant or as a result of any other act or conduct of defendant or that any member of the public was misled or deceived at all.

VIII.

That in the conduct and operation of its business the defendant at no time created the relation of debtor and creditor between its savings customers and itself, did not receive or solicit any money as deposits as a bank or as a savings bank or do or perform or advertise the doing or performing of any act or thing contrary [120] to or in violation of the Acts of Congress or the rules and regulations of the Home Loan Bank Board. Defendant at all times did carry on, conduct and operate its business in the manner and as prescribed by said Home Loan Bank Board. None of the acts of defendant in the conduct or operation of its business violated

or were contrary to the provisions of the laws of the State of California.

IX.

The defendant in the operation of its business as a federal savings and loan association has for many years advertised and referred to itself as "Coast Federal Savings"; in so doing the defendant has acted in good faith and not as to lead or cause to be misled its customers or the members of the public and no evidence was introduced or offered by the plaintiff that any of the public was misled or that any member of the public dealt with the defendant under the belief or assumption that it was other than a federal savings and loan association. In so doing defendant has not advertised or held itself out to the public as a bank or savings bank.

X.

The words "bank" and "banking business" are used in these findings in the limited sense to refer to institutions defined as banks by the California Banking Code or subject to the supervision of the California Superintendent of Banks and to the business of such institutions. As between these institutions and federal savings and loan associations no attempt has been made to segregate or demarcate their proper spheres of business in the general banking and financial world.

XI.

The defendant is chartered by the Home Loan Bank Board for the purpose of promoting thrift

by providing a convenient and safe method for people to save and invest money and to provide for the sound and economical financing of homes. All the evidence presented [121] shows defendant to have followed and adopted the best practices of local mutual thrift and home-financing institutions as intended by its charter. The defendant in its publicity and advertising matter has encouraged its customers and the members of the public to practice thrift, to place their savings with the defendant, has advertised that the defendant is a member of the Federal Savings and Loan Insurance Corporation, that savings placed with defendant are insured by said federal insurance corporation up to \$10,000 per account and has engaged in other practices, all of which are approved by the said Home Loan Bank Board. The business of the defendant has been successful and its financial statement shows it to be financially sound. The defendant issued two types of account, namely, an investment share account in multiples of \$100 and a savings share account in any amount. In opening an account, the defendant issues to its customer a membership certificate either in a separate certificate or in a passbook, and said certificate constitutes said customer a member of the defendant entitling said certificate holder to one vote at all membership meetings for every \$100 or fraction of the \$100 certificates, but not to exceed a total of fifty votes.

XII.

The Home Loan Bank Board possesses ample power to regulate all of the business and affairs of the defendant and to correct any violations of the Acts of Congress or its rules and regulations. The plaintiff possesses no such power or authority over the defendant. The exercise of the powers urged by the plaintiff would defeat the purposes of the Home Owners Loan Act by bringing about regulations and supervision of a varying and conflicting character in the forty-eight states.

XIII.

The plaintiff has at no time requested or petitioned the Home Loan Bank Board for a hearing or other administrative action [122] concerning the manner in which the defendant was conducting its savings and loan business.

Conclusions of Law

From the foregoing findings of fact the Court adopts the following conclusions of law:

I.

Defendant is an instrumentality and agency of the United States Government.

II.

The Home Loan Bank Board had and still has primary jurisdiction over the subject matter of this action.

III.

Plaintiff is afforded by federal law and regulations an administrative remedy for grievances alleged. Before the State court can have jurisdiction of the subject matter it is necessary that plaintiff exhaust its administrative remedy, that is that it pursue that remedy to its appropriate conclusion and await its final outcome. This plaintiff has not done. Therefore, the State court had no jurisdiction of the subject matter and on removal to the District Court it is likewise without jurisdiction of the subject matter.

IV.

The federal government has exclusive jurisdiction to regulate and supervise defendant. The Act of Congress under which defendant is organized and the rules and regulations of the Federal Savings and Loan insurance Corporation and the Home Loan Bank Board, to which agency Congress has delegated plenary power over defendant, comprehensively cover and effectively govern the entire field of operations of defendant. These make it clear that Congress intended no regulation of defendant except by the federal government and that Congress intended that the federal government should [123] and that the federal government has preempted the entire field of regulation and supervision of defendant leaving no jurisdiction whatever in the states to regulate or supervise the operation of defendant by either legislative or administrative action or otherwise. Therefore, the

state statutes relied on by plaintiff are invalid as applied to the defendant.

V.

All the advertising and other acts of defendant which are complained of by plaintiff in its complaint have been expressly or impliedly authorized by federal authority with the possible exception of the one isolated and unrepeatd instance when defendant's house organ used the word "interest." The State laws invoked by plaintiff are in conflict with this authority and are for this additional reason invalid as applied to defendant.

VI.

By virtue of defendant's charter, the rules and regulations of the Home Loan Bank Board, and the Act of Congress under which defendant was created, defendant has the authority, right and permit from the United States Government to solicit and receive savings and to use in its business and advertising the words "savings" and "savings account."

VII.

To impose on defendant and other federal savings and loan associations the invoked state statutes would hamper, frustrate and impair the functioning of the uniform nationwide federal savings and loan system intended by Congress. The state statutes are, for this additional reason, invalid as applied to defendant.

VIII.

The California Legislature did not intend that any of the California statutes cited by plaintiff should be applied to defendant or other federal savings and loan associations. [124]

IX.

Plaintiff's complaint and each of the counts thereof fails to state a claim against defendant upon which relief can be granted.

X.

Defendant has not forfeited nor is it liable to the State of California for any sum whatsoever.

XI.

Plaintiff is not entitled to an injunction or restraining order, nor any other relief.

XII.

Defendant is entitled to judgment in its favor and for its costs incurred herein.

.....,

Judge of the District Court.

Lodged July 6, 1951.

[Endorsed]: Filed (not used by Court) August 3, 1951. [125]

In the District Court of the United States for the
Southern District of California, Central Division

No. 10528-C

PEOPLE OF THE STATE OF CALIFORNIA
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of California,

Plaintiffs,

vs.

COAST FEDERAL SAVINGS AND LOAN
ASSOCIATION, a Corporation,

Defendant.

JUDGMENT FOR DEFENDANT

This cause came on regularly for trial before the Court sitting without a jury, on the 12th day of February, 1951, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, the Court now adopts its opinion as its findings of fact and conclusions of law, and directs that judgment be entered in accordance therewith; now, therefore:

It Is Hereby Ordered, Adjudged and Decreed:

That plaintiff take nothing by this action but that the same be and is hereby dismissed. That defendant have and recover of the plaintiff costs taxed at \$73.32. That this judgment shall be with-

out prejudice to the right of plaintiffs to [126]
pursue and exhaust administrative remedies.

Dated Aug. 3, 1951.

/s/ JAMES M. CARTER,

Judge of the District Court.

Approved as to Form.

.....,
Attorney for Plaintiff.

Receipt of copy acknowledged.

Lodged July 6, 1951.

[Endorsed]: Filed August 3, 1951.

Docketed and entered August 7, 1951. [127]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the People of the State of California and Maurice C. Sparling, as Superintendent of Banks of the State of California, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment docketed and entered herein on

August 7, 1951, in favor of the defendant and against the plaintiffs.

Dated August 30, 1951.

EDMUND G. BROWN,
Attorney General of the State
of California.

WALTER L. BOWERS,
Assistant Attorney General.

/s/ BAYARD RHONE,
Deputy Attorney General, Attorneys for Plaintiffs
and Appellants.

Affidavits of Service by Mail attached.

[Endorsed]: Filed September 4, 1951. [128]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF RECORD
ON APPEAL

To the Clerk of the above-entitled court:

The appellants, People of the State of California and Maurice C. Sparling, as Superintendent of Banks of the State of California, through counsel, have appealed from the Judgment which was entered in the above-entitled matter on August 7, 1951, and hereby request the preparation of the record on appeal.

The appellants hereby designate the papers and records on file or lodged with you which they desire

to have incorporated in the record on appeal, which consists of the complete record pursuant to Rule 75(d) of the Rules of Civil Procedure for the United States District Court, which records and papers include and are hereby designated as follows:

1. Complaint for Injunction to Restrain Violation of State Banking Code and for Penalties; [131]
2. Petition for Removal of Civil Action;
3. Notice of Petition for Removal of Civil Action;
4. Answer to Complaint (for Injunction to Restrain Violation of State Banking Code, and for Penalties);
5. Stipulation dated March 8, 1950, relative to Exhibit "A" of Plaintiffs' Complaint;
6. Stipulation of Facts for the Purpose of Trial;
7. Petition for Leave to Appear as Amicus Curiae and Order thereon;
8. Opinion of the Court filed June 21, 1951;
9. Minute Order of June 21, 1951;
10. Judgment docketed and entered on August 7, 1951;
11. Reporter's Transcript of Proceedings at the trial of said action on February 12, 1951, a copy of which is attached hereto;
12. All Exhibits;
13. Notice of Appeal;
14. Appellants' Designation of Record on Appeal.

Pursuant to the provisions of Rule 75(o) of Rules

of Civil Procedure for the United States District Court, and Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit as amended, request is hereby made that the Clerk of the above-entitled court transmit all of the original papers and exhibits as designated by the appellants, and the appellees, and the files dealing with the action or proceeding in which the appeal has been taken.

Dated August 30, 1951.

EDMUND G. BROWN,
Attorney General of the State
of California.

WALTER L. BOWERS,
Assistant Attorney General.

/s/ BAYARD RHONE,
Deputy Attorney General, Attorneys for the People
of the State of California and Maurice C.
Sparling, as Superintendent of Banks of the
State of California, Plaintiffs and Appellants.

[Endorsed]: Filed September 4, 1951 [132]

In the United States District Court, Southern
District of California, Central Division

No. 10528-C

PEOPLE OF THE STATE OF CALIFORNIA
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of California,

Plaintiffs,

vs.

COAST FEDERAL SAVINGS AND LOAN AS-
SOCIATION, a Corporation,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Honorable James M. Carter, Judge Presiding.

Appearances:

For the Plaintiffs:

FRED N. HOWSER,
Attorney General, State of
California, by

WALTER L. BOWERS, ESQ.,
Assistant Attorney General.

For the Defendant:

FRANK P. DOHERTY, ESQ., and
CRAIL & CRAIL, by
FRANK P. DOHERTY, ESQ., and
HARRY McMAHON, ESQ.

Also Present:

W. F. McKENNA,

Assistant General Counsel, Home Loan
Bank Board, Washington, D. C.

JAMES C. SHEPPARD, ESQ., and

FRANK S. BALTHIS, ESQ.

Thursday, February 23, 1950. 10:00 A.M.

The Clerk: No. 10528-C Civil, People of the State of California, and others, v. Coast Federal Savings and Loan Association, for pretrial hearing and setting.

Mr. Doherty: If the court please, I see the State of California represented here by Assistant Attorney General Walter Bowers. He is so modest, he didn't announce his presence. Mr. McMahon and I are here representing the defendant Coast Federal Savings and Loan Association. What order does your Honor desire to proceed in? Do you wish to hear from the State first?

The Court: Ordinarily in these pretrial matters we hold them in chambers, and they are rather informal. If you want to conduct it here in the courtroom, we can, or we can bring the reporter into chambers where we can smoke and discuss the matters that come up.

As far as procedure, the purpose of a pretrial, as I understand it, is to find out what the issues are in the case, what the contentions of the parties are, what theories you have, then to find out what

matters can be stipulated to and agreed upon, and generally facilitate the eventual trial of the case. As a matter of fact, it is my theory that a pre-trial is a part of the trial; that somewhere in the trial it is necessary for a person or a lawyer to [2*] put his cards face up on the table, and it is my theory that a pretrial is that time. In other words, if you have some theory that you are going to spring at trial, I want to hear about it at the pre-trial and not have it held back and then sprung upon me and opposing counsel at that time.

Mr. Doherty: Would your Honor prefer to have the hearing in chambers or open court, or part in open court and then later a conference in chambers?

The Court: Well, as I understood the suggestion of counsel, when this matter was set, it was called a pretrial, but it was to be a rather general exploration of the issues.

Mr. Doherty: Yes, your Honor.

The Court: I think we might as well adjourn to chambers, bring the reporter in there, and make ourselves comfortable.

Mr. Doherty: May I take into chambers with me Mr. McKenna representing the Home Loan Bank Board, and Mr. Sheppard and Mr. Balthis, who represent the California Savings & Loan Association?

The Court: You may. We will adjourn to chambers, then.

(The following proceedings were had in the chambers of the court:)

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Bowers: Judge, maybe we had better state our position, because we, at least, think it is very simple. In other words, we go upon the premise that a savings and loan association is not a banking organization at all, and that it [3] may not carry on banking business, and we think that the acts complained of by the defendant in this case lead the public to believe that it is engaged in banking. And that is all that we are trying to prevent, the particular actions that we think give the public the idea that the defendant is carrying on a banking business. Primarily on that we think that they should use their name, including the "Savings and Loan Association" part.

The Court: I read the memorandums over and the file. I noticed your complaint on that score. Specifically, also, you complain of their solicitation of money, don't you?

Mr. Bowers: That's right. In our opinion the ordinary connotation of a savings account is a bank account and not a savings investment.

The Court: I want you to enlarge upon that. It is a little hard for me to understand that point. I can understand how you might complain of their use of names or titles, and so forth, but there were matters contained in your pretrial memorandum that indicated that the State objected to their soliciting money. It seems to me——

Mr. Bowers: No. We have no objection to their soliciting money. In other words, that is part of their business, they solicit investments, savings investments. But what we do object to is their em-

phasizing the opening of savings accounts, which we think in common parlance indicates a [4] savings bank account. In other words, we have no idea or no authority to regulate the business of a savings and loan association, but we think it goes beyond that when it gives the appearance to the public that it is doing a savings bank business.

The Court: What type of solicitation do you think a savings and loan, building and loan, a federal institution, could lawfully carry on?

Mr. Bowers: Carry on all of the operations of an ordinary building and loan. We think savings and loan and building and loan are practically synonymous.

The Court: What type of lawful solicitations do you think it could engage in?

Mr. Bowers: Savings investments. Any of their solicitation that they make is perfectly unobjectionable to us, except the indication therein emphasizing savings accounts.

The Court: In other words, if they run an ad and say, "We solicit savings investments, Coast Federal Savings and Loan Association," you would have no objection?

Mr. Bowers: No objection at all.

The Court: But if they ran an ad and said, "We solicit savings accounts"—

Mr. Bowers: And said, "Open your savings account with us, Coast Federal Savings," we think that tends to lead the public to believe that they are getting into a regular savings [5] bank account.

Mr. McMahon: May I ask Mr. Bowers a question?

Mr. Bowers: Yes.

Mr. McMahon: If the Federal Government permitted us to use the term "savings accounts," would you object?

Mr. Bowers: I think we would object upon the ground that we do not think that the federal statute permits that. In other words, as I take it, the federal statute expressly prohibits the taking of deposits.

Mr. McMahon: Sir——

Mr. Doherty: I was going to suggest to my Irish friend, let the State develop their case entirely, and then let us state ours fully, without engaging in colloquy between counsel. We Irish have a faculty, Judge, of always trying to get into every fight.

Mr. McMahon: I apologize.

The Court: I am Irish, too, so I know what you mean.

Mr. Bowers, what I was referring to was item 6 in your pretrial memorandum. You say: "The powers and duties of such savings and loan associations are not too clearly set forth by the Federal Act. However, as stated in Section 1464, they are primarily 'to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes.' "

In other words, it gets down, then, largely, in your [6] contention, to a matter of language. If they say "We solicit your investment, open an ac-

count with us," do you object to the word "account," for instance?

Mr. Bowers: I don't think that making an investment is opening an account. I think every time they do anything to lead the public to believe that when they put money in there that they are opening an account only and not making an investment, that they are then tending to advertise it is in the nature of a banking business. I think that is the distinction. "Invest your savings with us," we have no objection to that at all. That is what their purpose is.

The Court: These building and loans pay a fixed per cent on amounts deposited with them, don't they, depending on the resolutions passed by the building and loan?

Mr. Bowers: I believe they do.

The Court: One might be two, one might be three.

Mr. Bowers: Yes, I believe they do.

The Court: What is the difference essentially, as a practical matter, between going down and opening a savings account with a bank and getting one per cent or one and a half, whatever they pay on a savings account, and going down and putting a thousand dollars with a building and loan and getting interest on it?

Mr. Bowers: They are making an investment there and becoming the business itself, and they are not standing on [7] the basis of an account of a debtor-creditor position.

The Court: Do you think the public have any general conception of that distinction?

Mr. Bowers: I believe they do. In other words, if there is no distinction, if we are wrong on the proposition that there is no distinction between an investment in a savings and loan or building and loan, and depositing money in a bank, then we have no case. There is no question about that.

The Court: Of course, what the public thinks probably is beside the point. The matter would be controlled by statute, laws, and cases. But I am wondering as a practical matter if the public generally have any conception of that distinction. Don't they ordinarily think when they put money with any savings and loan or building and loan, that they are putting a certain amount of money in there which will draw interest and which they can pull down later on, with possibly some exceptions about having to give notice if notice is required? Doesn't the building and loan have a right, if demand is made for money, to require a certain period before money can be pulled out? What is that period, three months?

Mr. McKenna: After the end of the month they have to put them on a rotating basis so that all of the money of the association can be used only to a limited extent for other [8] purposes than to meet withdrawals, but there is no specific time within which they have to meet withdrawals.

The Court: But if they want to meet them——

Mr. McKenna: As a matter of fact, every as-

sociation in the United States meets them immediately.

Mr. Doherty: Savings banks have the same provision in the law, that you must give 30 days' notice. But the savings banks never insist upon it or require it, and would not require it, I guess, except in a time of stress where they might, with the consent of the comptroller of the currency or bank superintendents, insist that no savings account be withdrawn excepting on 30 days' notice. But it is the law, and it is in their pass-books, and the law is, with the federal savings and loan, that when an account there wants its money, and they are not able to pay, as Mr. McKenna says, then the Board puts them on a sort of pro rata basis until they begin complying. But that doesn't apply, because under the federal law they can immediately make a claim on the insurance company or ask for a loan, or advance, from the Federal Home Loan Board. That is correct, isn't it? And put up their securities? In other words, transfer their assets to the extent needed to pay all obligations. I am only quoting Mr. Crail, that he could be liquid in 30 days and pay every claim he has by turning in his government bonds and taking his home loans, mortgages, trust deeds on home [9] loans, and turning them over to the head of the institution and get cash immediately. Is that correct?

Mr. McKenna: If his Honor is interested, I might give a brief outline of how they do convert from frozen to liquid. There is a dual system. First a Federal Home Loan Bank system was created

as a parallel system to the Federal Reserve system to provide a source of reserve credit similar to that provided by the Federal Reserve Bank system to the commercial banks, so when it needs cash, when it is in a frozen condition, it can raise that cash from the Federal Home Loan Bank of which it is a member, without liquidating its mortgages, by depositing those mortgages with the bank and obtaining a loan on the security of them. That is a normal means whereby a building and loan obtains credit when it needs it, converting from a frozen to a liquid condition. In time of emergency there is also the Federal Savings and Loan Insurance Corporation. That is the corporation which guarantees the face value of the savings up to \$5,000 in every association that is insured, but the Insurance Corporation doesn't only pay off the saver—it does that when the Association can't meet the obligation—but it will also make cash available in time of emergency to an association so it can pay off the saver.

Mr. Doherty: Judge, if you would like to hear our viewpoint briefly I will try to give it to you briefly. [10]

The Court: I think I have your point, Mr. McKenna. Let me explore it a little further. Mr. Bowers, you mentioned that under the savings and loan set-up a person makes an investment and becomes an investor in this particular enterprise, it is money being used for loans for homes. There is a reverse end to that, is there not, that the fellow who borrows money from the building and loan

is also technically some type of a member, isn't he? That came to me as a sock, and I am a lawyer. I borrowed money on a little house that my father and mother lived in, I went down and applied for a loan, as you would to a bank, and got a loan. When the thing was finally granted I got a book which said something about being a member in this association. That was the first intimation I ever had that there was a membership or a participation on the borrowing side.

But, actually, for all intents and purposes for the conduct of business the fellow who borrows money is borrowing it from the building and loan just as he would from a bank; he gives his security, makes his payments, and if he doesn't pay, it is foreclosed on him. Is there any other legal result that flows from that purported membership that you get in that little book?

Mr. McKenna: There is, of course, the voting power in the Association, which is rarely exercised.

The Court: Does the borrower have a vote, [11] too?

Mr. McKenna: Yes. There is a fundamental purpose which is twofold in the case of a savings and loan association. One purpose is to promote economical home financing. The association exists not just to make money, but to provide a means for financing homes. That is one aspect that is supposed to be shown or illustrated by the fact that the borrower is a member.

The Court: Mr. Bowers, your contention is that it is largely a matter of the language that is used?

Mr. Bowers: I think so. I don't think there is any doubt at all but what the defendant is carrying on, so far as what it actually does, savings and loan association business. But I think that what we object to is the way in which the advertising leads people to believe that it is carrying regular savings accounts, such as a savings bank account.

The Court: Mr. Figg, do you have the original file?

The Clerk: Yes.

The Court: The exhibits weren't attached to my copies.

Mr. Doherty: The exhibits are a part of the plaintiff's complaint, photostats.

The Clerk: They weren't sent over with the record on removal.

Mr. Bowers: There is a copy, your Honor.

Mr. Doherty: It should be a part of that original complaint, [12] photostats.

The Clerk: Was the complaint amended after it was removed? There is no amended complaint, is there?

Mr. Bowers: No.

The Clerk: Were they so large that they wouldn't go in the file?

Mr. McMahon: We have had other ones made, and if you want to compare them later—

Mr. Doherty: I think his Honor now has a copy,—which were an exhibit of the Attorney General's complaint, and those are identical with the original complaint.

Mr. Bowers: As far as I know. I am more or less pinch-hitting for Mr. Rhone here.

The Court: I have a copy here for today, and later on you can arrange to see that the clerk's file has a complete copy of the exhibits.

Mr. Doherty: With the court's permission the clerk could attach them. It would be the application of defendant to correct his record on removal.

The Court: That permission will be granted, and you agree with counsel what you are attaching, send up a stipulation on it, and then Mr. Figg can put it in the file.

I notice the first picture here. I take it what you object to is the word "Bank" in big letters?

Mr. Bowers: That is emphasizing, as I say, the bank [13] feature.

Mr. Doherty: The first and second pictures are both about the same, "Savings Accounts," "Member Federal Home Loan Bank," with the word "Bank" emphasized.

The third picture is "Coast Federal Savings" emphasized with the word "Coast" in large letters.

The next picture has the words "Coast Federal Savings" with "Joe Crail, President" under it.

"Open Your Savings Account Here." The last one is a sort of a catch-all of everything.

The Court: I noticed in the defendant's pretrial memorandum that they said there was one instance in which complaint had been made to, I believe it was, the size of the word "Bank," and that it had been corrected. Were these pictures taken after that alleged correction or before?

Mr. Doherty: They were taken before. There was a suggestion from the representative of the Federal Home Loan Bank that the word "Bank" be slightly de-emphasized. It was not an order. And it was changed. That is correct, isn't it, Mr. McMahon?

Mr. McMahon: Yes, changed before this action was filed.

The Court: Then I take it you object, also Mr. Bowers, to this advertising, for instance, which shows an account book, a thumb and finger holding up an account book? Is that one of the things you object to? [14]

Mr. Bowers: That is one of them, with, I think, "Coast Federal Savings." "Open Your Account With Coast Federal Savings," I believe it is.

The Court: You object to that?

Mr. Bowers: We object to that.

The Court: Because of the picture of the book or because of the word "Account" or "Savings" or what?

Mr. Bowers: Because of the word "Savings Account" and "Coast Federal Savings" without "And Loan Association." I think probably there would be no objection whatsoever if the full name was used at all times.

The Court: If they used the full name you would not object to the picture of the book and the statement "Open Your Savings Account"?

Mr. Bowers: Let me tell you this: I think "Savings Account"—that the word "Account" should not be used, because it seems to me that "Savings

Account" connotates something different than what the actual transaction is. I don't know whether it is the position of the defendant—Frank, is it your position that when you open a savings account in a bank and when you put your savings in a savings and loan association you are in exactly the same position?

Mr. Doherty: No, we don't claim any debtor and creditor relationship in the federal savings and loan. To all intents and purposes from the standpoint of the person who puts the [15] money in it is the same. In other words, a federal savings and loan does not want short-term deposits, it does not want accounts where the depositor or the investor says, "I want my money back" next week or next month. If they were to say that to Coast Federal Savings, Coast Federal Savings would say, "No, you go over to the bank and put that in the bank"; which is a fact. If they say, "I want to put this in for 30 days," or "60 days," well, we don't want that type of business. We want long-term investments. You want to put that in a bank. You can't put in a thousand dollars now and draw out \$100 next week and \$100 each week. We don't want that type of business.

That is correct, isn't it, Mr. McMahon?

Mr. McMahon: Yes, sir.

The Court: What minimum do they generally fix? At least a year?

Mr. Doherty: They advertise that they want long-term investments, and they want the accounts to stay with them. I do not know of any instance

where they say it must be in for three months or six months or a year. But when they learn from the very nature of the conversation with the person who opens the account that it is going to be for a short term, then the inquiry is made, "How short?" And if it is just for a brief period, it is then said that they do not want that business. That belongs in a bank. Go over to a [16] bank and not an institution of this sort.

Fundamentally, Judge, this whole thing gets down, as I indicated in open court when this matter came up,—it is a matter of both federal and state policy. If the Attorney General's position was correct that the State has power to enact laws controlling the business of a federal savings and loan, they could not only go as far as the Attorney General is now contending, but they could go and completely prohibit them. In other words, if we concede that you can't use the word "savings," that you can't use the word "accounts," that you can't use the words "member Federal Home Loan Bank," then the State could go in and say, "You can't use the word 'bank' at all, you can't use the word 'account,' you can't use the word 'savings,' you can't use the word 'return.' " They could go further and say, "You cannot invest in particular types of securities."

Now, the Act starts off, as your Honor has read, with the bank, where it says, "to provide for the financing of homes, * * *" but right down in the next section (c) it says, "any portion of the assets of such associations may be invested in obligations

of the United States or the stock or bonds of a Federal Home Loan Bank.”

It gives them a very wide field of investment.

We will take it, for instance, the Attorney General relies upon Section 100 of the Banking Code. It reads: [17]

“This Code is applicable to the following:

(b) All national banking associations”——

Keep in mind the bank superintendent only has supervision over state banks.

“All national banking associations authorized to transact business in this state to the extent that the provisions of this Code are not inconsistent with and do not infringe paramount federal laws * * *.”

In other words, in creating the National Banking Act, Congress explicitly stated that Congress in the Federal Government has supreme jurisdiction in certain fields, and in other fields it says the State may have jurisdiction, such as subpoenaing records and the matter of keeping records, and things of that sort; that Congress did not go into that. So this particular section 100 had been amended to read as follows, that it has jurisdiction over all federal savings and loan business except where it is inconsistent and does not infringe upon paramount laws.

The Court: Of course that is the legal question involved here right on the nose, what is the authority of the State of California in connection with a federal institution?

Mr. Doherty: That is correct.

The Court: As a practical matter, let me ask this about banks. Doesn't the State Superintendent of Banks limit his [18] activities largely to State banks that aren't national banks?

Mr. Bowers: I think primarily so, yes. But you understand that we are by no means attempting to say that we can regulate federal savings and loan associations. We have nothing to do with federal savings and loan associations, so far as they function within their authorized powers. When they go beyond their authorized powers, we don't think that because they are federal institutions——

The Court: Who is going to determine that? Is the State going to determine it, or is some federal agency going to determine it?

Mr. Bowers: I think that is a matter that the court has to determine, isn't it? In other words, a federal institution just can't run hog-wild and say, "I am a federal institution and I do as I please," whether it has authority from the federal government to do it or not.

Mr. Doherty: May I answer that briefly? The National Banking Act, your Honor, gives practically supreme authority to the comptroller of the currency, that is, the treasury department comptroller of the currency, over national banks. The state superintendent, if he attempted to walk into a national bank for the purpose of examining their records, the janitor would greet him, he wouldn't get up as high as anyone else. But they extend the courtesy to the bank superintendent so that there will be a happy relationship between [19] state

banks and federal banks, and they sort of coordinate their activities.

The Court: But the state superintendent does limit his activities practically exclusively to state banks?

Mr. Doherty: Correct.

The Court: Does he exercise any jurisdiction at all over national banks in this field of records that you mentioned?

Mr. Doherty: The federal law is silent or acquiesces in the State having jurisdiction over letting the bank records be subjected to subpoena, subpoena duces tecum, and retaining the records for a certain period of time where they must be available for litigants, and things of that sort. That is, the federal act either affirmatively in some places and by acquiescence in others gives that jurisdiction to the State.

In California we have a Building and Loan Commissioner. The Building and Loan Commissioner wouldn't attempt to come in and exercise jurisdiction over a federal savings and Loan association. There are a lot of state building and loan associations, savings and loan, some are stock and some are mutual companies. This is the crux of this case, your Honor. Your Honor said to what extent should there be federal authority and state authority? In creating the National Banking Act, as I said, the Congress at that time was more jealous of state rights than they were when we reached into the early '30s. [20] This Federal Home

Loan Bank Act was enacted at the tail end of the Hoover administration, then was amplified and its powers increased in the early part of President Roosevelt's administration. It was enacted, first, I think, in July of 1932, then it went on in '33, '34 and '35. When they enacted this law they gave vast powers to the Board, and that was power evidenced by rules and regulations. They start off with this simple language, as your Honor has read:

"In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes the Board is authorized, under such rules and regulations as it may prescribe, * * *."

Now, that was an affirmative act of Congress. That is not in the National Banking Act. It doesn't give the Comptroller of the Currency complete authority by rules and regulations to determine the jurisdiction of federal banks and their activities, but the Board here was giving rules and regulations. So this company, the Coast Federal Savings, is in this position: They are operating under an Act of Congress where the Board has prescribed rules and regulations that have the power of law, and these rules and regulations tell Coast Federal Savings how they are to transact business. And it is the only logical way it could be done. If the Attorney General's position was right, we would have forty-eight [21] different types of federal savings and loans in the United States. We would have forty-eight conglomerate methods. One with vast powers

and one with practically no powers. So the federal government by its Act of Congress has given this Board wide authority, and as the case of Finnegan says, which we referred to in our memorandum:

“Corporations organized under the Act have the lawful right to transact its business within a state under the sole authority and control of the laws of the United States free from state interference.”

The Court: That is the meat of the whole case. I am familiar with the power of the Home Loan Board. Is that what you call it?

Mr. McKenna: Home Loan Bank Board.

The Court: And I have also had some experience with these matters where a building and loan was doing something which ran afoul of the regulations of the Board. I recall one case where they sent out a file and asked the prosecution of a building and loan because of improper advertising in the paper. They were advertising in such a way that it was violative of one of these regulations that has the force of law.

I saw the ad and it seemed apparent to me there must have been some error, so we communicated with the building and loan and they made representations, which I believe were true, [22] that the particular advertising had occurred by reason of a printer's mistake, and agreed to correct it, and so forth. So when they made the correction and gave assurances it wouldn't happen again we declined prosecution on it. That is when I was upstairs.

There apparently is ample power under those

regulations to discipline these building and loans. There is some question sometimes as to how that administrative power is exercised, which depends upon the length of the chancellor's nose. As in equity, you might have strict enforcement of those regulations, and then, again, you might have lax enforcement. I am talking offhand; I am not making any decision on this. But it seems to me it is essentially the business of the federal government to regulate its own agencies.

Mr. Bowers: I don't think there is any question about the fact that a national bank doing a trust company business does it subject to the laws of the State; doesn't it?

Mr. Doherty: A federal bank?

Mr. Bowers: Yes.

Mr. Doherty: That is because the National Banking Act makes it so. If the federal government had said in the National Bank Act that the powers of a national bank doing a trust business shall be prescribed by the Comptroller of the Currency and rules and regulations, the state law would not even be in the picture. [23]

Mr. Bowers: That's right, but when they are doing a trust company business, they are going beyond their authority or authorization as a national bank, and therefore they are subject to the state laws.

Mr. Doherty: That is where the federal law is silent on the question, or by implication yields it to the State. But not where the federal law says it assumes jurisdiction.

The Court: Don't these rules and regulations go so far as to practically specify what a building and loan can do and what it can't?

Mr. McKenna: In great detail.

The Court: It is my understanding that there is great detail in outlining things they may do and things they may not do. It goes even further than what an ordinary statute would do.

Mr. Doherty: Much more detailed than a statute. Mr. Crail in operating this company down here, he can't operate under the Building and Loan Commissioner, he can't operate under the Superintendent of Banks; he must look to the source of his authority and comply with their rules and regulations. Then if he varies from that he is cited. In the case of this word "bank" I don't think the Board construed that as a violation, but in order to work out a comity, the suggestion is made "reduce the size of the word; make the Federal Home Loan Bank not emphasizing the word 'bank'" and [24] it was done.

As I indicated in open court, your Honor, this is a matter primarily where the State Superintendent, the Comptroller of the Currency and the Board down in Washington ought to sit down and say——

The Court: By comity?

Mr. Doherty: Yes. (Continuing) ——out in California these things are happening. Now, what is the policy of the Board and the Comptroller of the Currency on these matters, because I know you

must operate uniformly throughout the United States?

In the Middle West and East they have mutual savings banks. That is the name given them. These are old-time institutions. But they are really building and loan associations. What the banks overlook is this: that building and loan associations have been in the home loan business for over a century, and savings banks in California have been earlier than others, but only by a few years, and advertising trust deeds and mortgages has only for 20 years been engaged in by banks. The savings and loan people could be in this court and say, "Here, banks are invading our field, they are advertising for loans on homes, that is our field, we have been in that field for a century."

The Court: It seems to me that the principle that is involved here is this: You have a government agency authorized [25] by a statute to be controlled by regulations which the Board is empowered to make. Now, if that agency, building and loan, we will say, branches out to an entirely different line of business, supposing it sets up a bar, is going to operate a bar——

Mr. Doherty: Or a trust business.

The Court: I took an extreme case, a silly one, but a trust business would be a better one. Then it seems to me that the State would have some authority on that new kind of business. But as long as its business is confined to generally what the statute provides, even though it is run poorly, it seems to me it is federal business, it is a matter of

federal jurisdiction, not of the State, if I make myself clear.

Let's assume for argument that these building and loans are run sloppily and poorly, and that there is a complete disregard of these federal regulations, I can't see offhand—and I am only talking offhand now—how that gives the State any jurisdiction in the matter to even inquire. I think they would have the right to take it up through comity with the comptroller, in the case of a bank, or with the Home Loan Bank Board in the case of building and loans. But how badly a federal instrumentality is operated doesn't cause it to cease being a federal instrumentality.

Mr. Bowers: That is perfectly correct, and we are not [26] concerned with its operations, whether they are good or poor, within their field or scope.

The Court: You claim they are clear outside of their scope?

Mr. Bowers: We claim they are going outside of their scope in advertising in such a way as to lead the public to believe that they are doing savings bank business.

Assuming now, if we can, I think from what Mr. Doherty says they don't contend that they are entitled to do a savings bank business.

The Court: This is very similar to the problem that I had up with your office with Bill Bonelli on the seizure of that officers' club at San Diego.

Mr. Bowers: That is right.

The Court: There there was an officers' club operated by the federal government through, I

guess, the Navy, wasn't it?—a Navy officers' club, and it was on city property which the government didn't own, the city just permitted them to be there, but the club was a government instrumentality. Now, Mr. Bonelli contended that, actually, instead of being open just to officers it was open to anybody, practically a blind pig in the city park, and Bonelli went down and—when I say "Bonelli" I mean the Board of Equalization—arrested the bartenders, seized the liquor, and took it away. We finally settled it in conference between Mr. Bonelli and [27] myself, but I took the position that no matter how poorly the agency was run it was still a government instrumentality and he had no more right to step in and seize the liquor and arrest the bartenders of a federal officers' club than he would have to seize a battleship or an army tank because something was improper in the way it was being handled.

Mr. Bowers: I don't believe the State would be limited to have to say that it had no authority or direction, assuming——

The Court: The question comes up, then, is the Coast Federal operating outside of the scope of its powers and duties as provided by statutes and regulations?

Mr. Bowers: I think that is the question, yes.

The Court: Or is it merely operating irregularly within those powers?

Mr. Bowers: Yes. If it is operating irregularly within those powers, it is a federal matter to adjust.

But we don't think they can go in there and violate the state laws in other matters.

For instance, we don't think they could go down there and put a 20-story building up there.

The Court: I will concede if Coast Federal, having been given certain powers and duties by statute and by regulation, proceeds to do certain business, carry on business not contemplated by the statute, then they would come under applicable state [28] law. But it seems to me there has to be a complete break into some new field. As long as they are sticking to the field that they are authorized to operate in—in other words, it couldn't be some matter of slight degree, there would have to be some major movement in a new field, it seems to me, to come under your theory.

Mr. Bowers: Supposing they put out ads all over the place "Our business is banking," that comes down to it. That is a violation, according to our state law. Now, is their business banking? If it isn't, are they because they are doing an investment business——

The Court: Let's see what they have done. They are actually not doing banking, because you are conceding they are doing the things and in the way provided by statute. But what they are doing is stating that they are doing banking.

Mr. Bowers: That is right.

The Court: Therefore, isn't that a matter that should be administratively corrected by the Home Loan Bank Board that has control over this institution? They are doing puffing, they are talking

too much about what they are doing, but they are not actually doing banking.

Mr. Bowers: That is right. But they are violating a state law in representing that they are, which to my mind is just the same position as though they erected a 20-story building [29] contrary to law, or violated any other laws in connection with their business, although it was not that they were actually operating illegally so far as their savings and loan association business was concerned.

Mr. Doherty: I might answer your Honor's suggestion, or, rather, the Attorney General, on that matter of doing a banking business. That arose rather innocently. They had put out a paper called the Challenger, and they had a contest, and a woman wrote in a good slogan would be, "Our business is banking, banking is our business." Now, that was just an excerpt from a letter, and that is what the State seized upon as advertising. And, to my recollection, it only appeared once, is that right?

Mr. McMahon: That is right.

The Court: Did it only appear in this column?

Mr. Doherty: Yes.

The Court: All they did was quote a letter, they didn't carry it into their slogans in any way?

Mr. Doherty: That is the whole story. We never adopted a slogan. It was just simply a courtesy to some woman who wrote in a letter.

The Court: Free speech.

Mr. Doherty: If we take the position of the

Attorney General on the matter of Coast Federal Savings, suppose he should bring the Bank of America in and say, "You are representing [30] yourself here as a state bank." "Why are we?" "Because everywhere in great big letters is 'Bank of America,' when you are 'Bank of America National Trust and Savings Association,' and you are not putting that down in small letters, but everything on your passbook, your windows, and your ads is 'Bank of America.' You are advertising yourself or giving the people to understand that you are a state bank when the fact is you are not." Well, now, there is no merit in that. No more than there is any merit that when they say "Coast Federal Savings," that they are indicating that they are a state savings bank, because they don't say anything about a bank. They say "Coast Federal Savings." Everybody understands at this time that the federal government has gotten behind and given its active support to federal savings and loan associations in order to help the home building, to stabilize our economy, to bring a closer relationship between the federal government and home owners as a competitive field to banks and insurance companies.

In other words, heretofore banks and local building and loan associations occupied the entire field. In a time of stress they found out that was not adequate to protect the home owners, so they organized, as Mr. McKenna says, a parallel system to the Federal Reserve System, but put it over in savings and loan, to encourage people to make long-term

savings, to encourage thrift, to loan money at a low rate of [31] interest to people to buy and own homes. That is a national policy, a policy that every government is interested in, for people to own homes. Now, to say to the Coast Federal Savings and all these others—I might digress for a minute. The Attorney General is in the very odd position here of taking this position for the banks, when the Building and Loan Commissioner is at his other shoulder saying, “You take the position directly opposite to this, you are my attorney, too.” The State Building and Loan Commissioner is directly opposed to the position of the State Superintendent of Banks in this case. He wants no interference by the banks encroaching in the Savings and Loan field.

The Court: As a matter of policy, I can see it to be a pretty dangerous thing to say that the State—forty-eight states is what you would be saying—could step in and start interesting themselves in how federal building and loan associations are being operated.

I have another thought in this matter. You can quote me on this if you want to. This Home Loan Bank Board has done a lot of vacillating in the positions it has taken, and I think there have been times I had to step in in cases where it should have stepped in, because of probably the Long Beach case, and it has probably not done as good a job as it might have done in some of these situations. I would agree that the Coast Federal Savings

and Loan should not have a big [32] sign "Bank" that would look like it was a bank on the corner.

You tell me that it has been corrected.

It seems to me that the Home Loan Bank Board has power and authority to regulate savings and loans where problems like this probably wouldn't come up. But as far as the State having a cause of action—this is a suit for injunction, isn't it?

Mr. Bowers: Yes.

Mr. Doherty: And a penalty, \$100 a day.

The Court: That is my offhand view on it.

Let me ask you this, since we are talking about issues. You set forth these pictures in the People's complaint of this word "bank." It now appears, at least by a statement of counsel—I don't know whether it appears in the answer or not—that that was corrected before the suit was ever commenced. If you are seeking an injunction, you cannot get an injunction on something that was done in the past, it has to be something that was done as of the time that the suit was filed, and ordinarily there has to be the threat of continuing injury.

Mr. Bowers: Brought down to the time of judgment.

The Court: Yes. That raises the question whether you want to amend your complaint before this matter would go to trial, because if that factual situation is borne out, that that matter that you complain of was corrected before you [33] filed your suit, at least that part of your suit is out the window to start with, isn't that correct?

Mr. Bowers: That would be true. But we think that is just one of the factors in the whole situation of giving the impression that they are doing a banking business.

Mr. Doherty: I was going to suggest, your Honor—whether it is possible or not I don't know—I wish the State Superintendent was here, because he is a very fine public official.

Mr. Bowers: Frank, he asked to be here, and I assumed that this was to be merely a conference between the judge and the attorneys and I told him he couldn't be here.

Mr. Doherty: He is a very fine official.

Mr. Bowers: Mr. Mortimer wanted to be represented, and I told him he was not in the case at this stage of the proceedings.

Mr. Doherty: What has been said here, if the Attorney General could confer with the State Superintendent of Banks and the State Building and Loan Commissioner, and see if they couldn't work out some plan of comity with the Comptroller of the Currency and the Federal Home Loan Bank Board, where if it isn't covered now by regulation, any colorable or technical violation, it could be covered by a regulation. Because I don't think this court or any court, your Honor, can run a thing under the jurisdiction of an agency, of [34] the nature of a savings and loan association or a bank. The Comptroller of the Currency runs the national banks, the Board runs the savings and loan associations. I am satisfied that if the Attorney General and the State Superintendent of

Banks, the Superintendent of Building and Loan Associations, would get together with the federal authorities they could work out a workable plan.

The Court: It seems to me that such a conference might well be in order.

Mr. Doherty: Mr. Sheppard here is representing the savings and loan associations. Do you represent both federal and state?

Mr. Sheppard: We are appearing on behalf of the California Savings and Loan League, which has within its membership both state and federal savings and loan associations.

Mr. Doherty: What is the position of the Savings and Loan League with respect to the position of the Bank Superintendent in this matter?

Mr. Sheppard: We are very much interested in the question which has been discussed here, particularly points 3 and 4, which are made in the defendant's pretrial memorandum, and also in points 5 and 6, namely, a construction of the federal statute itself and the point which you have raised; if it developed further we would like to be heard on it at the [35] proper time. We agree thoroughly with what you have said with reference to the ambit of federal authority.

Mr. Bowers: Well, as a matter of fact, Frank, you had a consultation with the State Superintendent of Banks and myself, and I believe Mr. Rhone was present, two or three months ago, at which apparently you and the State Superintendent and ourselves were of the same mind.

Mr. Doherty: That is correct.

Mr. Bowers: We have been waiting ever since then for a development to come, because you were to take it up with your client.

Mr. Doherty: Here is the situation, your Honor: I always feel that lawyers who have any real co-operative spirit can get together sometimes and work out a case much better than bringing it into court, and I said at that time to the Bank Superintendent that Mr. Crail and the Coast Federal were not a bank in the accepted sense of a commercial bank, that they would not take money on deposit which would be subject to check, that they did not want, as a matter of policy, to take deposits for a short term, that they wanted long-term investments, that they were essentially a federal institution. When I got into it deeper—at that time I had not gone into the statutes—I found that anything that we might agree upon would be something that we should have the full approval of the Board. In other words, the Board might say, “Now, you [36] have made this agreement with the State Superintendent, but that is not our policy as a Board.”

What I have been trying to work out, and that is one reason Mr. McKenna has been interested in it, is the position of the Board on matters of this sort. In other words, whatever is done here in this suit, or by reason of a compromise, must be almost national in scope. They cannot establish a rule in a given case——

The Court: Without applying it elsewhere?

Mr. Doherty: Correct. And I could not agree

that our client, the Coast Federal Savings and Loan Association, make a commitment by stipulation or other agreement that would run in conflict with what the Board says should be done in a like case, because they say, "We ignore that; we told you to run your business this way, and now you have gone ahead and made an agreement with the bank superintendent to run contrary to our rules and regulations and our policies, and we can't agree." So, as I say, it was sort of lifted by force of law out of my jurisdiction, and I have had conferences with Mr. McKenna, I have had conferences with the Building and Loan group, to see if we couldn't work out an over-all policy that will be uniform in Los Angeles, San Francisco, Boston, Cincinnati or elsewhere. It is national in scope and not just a private litigation between two individuals.

Am I stating it reasonably accurate, Mr. McKenna? [37]

Mr. McKenna: I might state as far as our relations with the State authorities are concerned, the State Building and Loan Commissioner, they always have been close and amicable, and there isn't, as we understand it, any disagreement whatsoever in our supervision and the State Superintendent. There never has been any friction. As far as this terminology is concerned, we don't permit federal savings and loan associations to advertise that they are banks. That is in the interest of national uniformity, because in some parts of the country, building and loan associations are called banks. But we don't permit federal savings and loan associa-

tions to use that term. They are not banks as we understand it. We do permit them to use the term "savings account." That is also a national rule. I might state, historically "savings account" has been used for a long, long while by mutual savings institutions, by building and loan associations, and by mutual savings banks. It carries the connotation not of a checking account or deposit account, but just what it is, a savings account. It is something quite different than a deposit or checking account. As far as the terminology code of the Coast Savings, it should use the full name when it is not inconvenient to do otherwise. But we don't criticize associations for saying "Coast Federal Savings" as a matter of convenience. It is clumsy at times, every time you pick up a telephone to say "Coast Federal Savings and Loan Association." It [38] is certainly not improper for them to stop with the "Savings."

I think, and certainly hope, this can be settled without litigation, on friendly terms, with the State authorities, because we want to maintain our friendly relations with them.

The Court: Don't you think we have gone about as far as we can today on it?

Mr. Doherty: I would think so, your Honor. I would make this suggestion. This is where your Honor sort of need not commit yourself. If the Attorney General and the Building and Loan Commissioner, the State Superintendent of Banks, Mr. McKenna, Mr. Sheppard, should sit down and try to harmonize this situation and then take it on

back to Washington to see if the Board would agree on a sort of general policy, if a Board action is necessary, that there would be a sort of uniform policy up and down the State where the harmonious relations between State Building and Loan Associations and Federal Savings and Loan Associations, which have been harmonious up to date, would continue to be so, and where the banks would have no objection that anyone is attempting to invade their particular field, that would be the best thing. I have said from the beginning this is not a case for the courts, it is a case for comity, working out a plan for the common interest.

The Court: Nothing I have said here today do I want to be any decision in the matter. I am just discussing it with [39] you and giving you my slant on it. I might read a lot of cases that somebody would cite and change my mind. But I have expressed my first reaction to the problem. I agree with Mr. Doherty that it seems to me the first thing that ought to be done is to explore the possibilities of settling this matter upon some basis satisfactory to all parties. In fact, you know, according to these judges who write on pretrial procedures, one of the by-products of pretrial procedures is settlements. That is not the purpose of pretrial, but that is one of the by-products. It has been considered proper to get attorneys in here, even in personal injury cases that we get on diversity, and say to the attorneys, "How far apart are you on settlement now that we have discussed the matter?"

See what you can do to assist in settlement.” Some judges go quite far in that.

I don’t think they should ever coerce a person, but judges have even gone so far as to express offhand their opinion as to whether under the facts as they understood them the claim was excessive or the offer was reasonable, and so forth.

At any rate, I think that is the first thing that ought to be done. I don’t think the case ought to be set for trial at this time.

Mr. Bowers: Am I interrupting?

The Court: No. Go ahead.

Mr. Bowers: I want it understood by the court and by Mr. [40] McKenna that the State has been in that position from the start and has so expressed itself, and has written Mr. Doherty and telephoned him inquiring as to what progress he was making on getting together for a settlement.

Mr. Doherty: They have been very co-operative, your Honor.

Mr. Bowers: I don’t think that there is any idea and I don’t want you to have any idea that the **State is taking any** position in opposition to the federal institutions at all. Of course, I do think, myself, and I am not a financier and I just look at the stuff in the ordinary common man-of-the-street parlance that when I see “savings accounts solicited” especially where they don’t use the savings and loan association name at all, that to my mind it immediately brings up a regular savings account in a bank. That is the thing that we think

is not proper, and that is all that we are looking to.

Mr. Doherty: Walter, you go back in the history and you will find that the banks are interlopers in this field of saving, they are new. The old building and loans, they have been in it for, I don't know, one hundred years or more, haven't they?

Mr. McMahon: Yes, sir.

Mr. Doherty: And it is a new field for banks, and one that I am happy to see them in. But the banks can't say, "We [41] have seen it, and now you people who have been seeing it for a long while must get out of it."

The Court: I don't think we will try to define specifically the issues as we would at a pretrial. If this case has to be tried later we will get you in here again and see what we can get together on in so far as the issues are concerned, and what can be stipulated to.

As a matter of fact, it seems to me if this case has to be tried there ought not be any dispute as to what the Coast Federal is doing, as long as the attorneys get together on the particular facts, that on a certain date there was the sign and there was the literature. It seems to me a lot of this matter on the evidence side ought to practically go in by stipulation.

Mr. Doherty: I had hoped that we would never get to the point where it is now; that an arrangement could be worked out to do away with litigation; because no matter how carefully you draw a judgment in matters of this sort, five, ten, fifteen

years from now it embarrasses the situation. You can't anticipate what is going to happen in 1960 in this fast-changing world.

Mr. Bowers: Frank, we agree with you that it is a matter, of course, that the Federal Board is interested in, but we have never approached the Federal Board, assuming that you, as a member of that institution, would do so and would take [42] it up. There have been intimations that this is just something between the banks and the savings and loan association. But as far as I know, I never have talked with any banking association representative and I don't believe—I don't know the gentleman here—but I don't believe there are any representatives from banking associations here. We are not interested in that here.

Mr. Doherty: You couldn't be, because you represent the building and loan associations too.

Mr. Bowers: A building and loan association has nothing to do with this. Our State Act specifically prohibits any banking activities.

Mr. Sheppard: May I suggest, Judge Carter, that perhaps Mr. Bowers would like to make an inquiry from Mr. McKenna while he is here?

Mr. Doherty: I think we ought not take up the court's time, Jim, on a matter of this sort. I think if Mr. McKenna and Mr. Bowers and myself, representing the group, and the Bank Superintendent would sit down, that in an hour you probably could come out of the door with a reasonably good agreement.

Mr. Bowers: I believe so.

The Court: I would be glad to make available my time if you want a further conference and want these men present, if any value could come out of that. [43]

Mr. Doherty: All right, your Honor.

The Court: I have appreciated this frank discussion. We have kind of let our hair down about it.

Mr. Bowers: I can't let much of mine down.

The Court: What shall we do? Put it on the April calendar or May calendar for setting and see what you have done by that time?

Mr. Bowers: You can make it any time. As I have told you, and as I have told Frank, the State has been standing ready to put other matters aside to get together.

Mr. Doherty: May would be all right.

The Court: We will put it on the May calendar. We don't like to drop them off the calendar.

Mr. Bowers: That is the first Monday in May?

The Clerk: That would be May 1st.

The Court: May 1st for setting. [44]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this .. day
of, A.D. 194...

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed April 27, 1950.

November 13, 1950, 2:00 o'Clock P.M.

(Other court matters.)

The Court: I see Mr. Doherty has come in. We might as well take these up in order. If you are ready to proceed on the Coast Federal case, we will go ahead on that.

Mr. Doherty: We are ready to proceed, your Honor, for the defendant. I assume the Attorney General is for the plaintiff. Does your Honor desire to hear it in chambers?

The Court: Yes.

(The following proceedings were had in the chambers of the court:)

Mr. Doherty: For the appearances, Mr. Rhone, Deputy Attorney General, for the State of California; Mr. McMahon and Frank P. Doherty, for the Coast Federal Savings and Loan Association; and Mr. Frank Noon, a representative of the Federal Home Loan Bank Board.

Is that correct?

Mr. Noon: Yes, Supervising Agent.

Mr. Doherty: For Southern California?

Mr. Noon: California, Nevada, Arizona, and Hawaii.

The Court: Ready to go?

Mr. Doherty: Yes.

The Court: The question in this case is a relatively simple one factually, whether or not the Coast Federal Savings [2*] and Loan is holding itself out as a bank, whether it is acting as a bank, and whether the plaintiff State Superintendent of Banks has any authority or control over the agency, because of its federal character.

That is what it boils down to, doesn't it?

Mr. Rhone: I think that is correct.

The Court: You practically have pled your evidence, haven't you? You don't have any other proof to offer other than the things you set forth in these counts?

Mr. Rhone: We have no other proof to offer. It may be, of course, necessary to produce some oral testimony on some of them, but most of it is set forth entirely in the various counts.

The Court: That is, at least it is alleged, and most of that is admitted.

Mr. Doherty: The allegation about the advertisement of the bank, your Honor, before this action was commenced, there had been a complaint made and that objection had been removed at the request of the Federal Home Loan Bank Board.

Is that correct, Mr. Noon?

Mr. Noon: At my request.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Doherty: Mr. Noon, representing the Federal Home Loan Bank. So the question of the advertising of the bank is no longer in issue, because the correction had been made.

The Court: That is the use of the big word "Bank" and [3] "Savings" that you have photographs of, is that the thing you are talking about?

Mr. Doherty: Yes, overemphasizing the name "Bank." It was corrected months before this action was commenced. We contend that we have a right to advertise for savings, and the defendant is a member of the Federal Home Loan Bank and has a right to advertise to that effect, because the Act of Congress says specifically that they are a member of the Federal Home Loan Bank Board, that is, Federal Home Loan Bank, and that is about the only issue here.

We take the position that Congress has pre-empted the field on federal savings and loan associations, has appointed a board that has complete jurisdiction over those matters, and having pre-empted the field the State Superintendent of Banks has no jurisdiction to come in on a matter of that sort and file suit against one of the associations merely because the State Bank Superintendent thinks that the actions of the defendant are in conflict with state law. Our position is that it ought to be a matter handled entirely between the State Superintendent of Banks and the Federal Home Loan Bank Board, and let them come to a rule or regulation announcing their respective fields and policies.

I asked Mr. Noon just before I came into court if there was anything in the Federal Home Loan Bank Act, or in their rules or regulations, that in any way restricted or prohibited [4] what was being done by the defendant in this case, and Mr. Noon states there is not.

Is that correct, Mr. Noon?

Mr. Noon: That is correct.

The Court: Apparently there has been no success in this effort to get the federal agency and the state agency together.

Mr. Rhone: We think there was success. On March 2nd of this year an agreement was reached.

The Court: What was that agreement?

Mr. Rhone: The agreement is stated here (handing paper to the court). I think you have a copy, Mr. Doherty, don't you?

The Court: This was a press release that was never issued.

Mr. Rhone: That is true, but the two paragraphs in there, numbered paragraphs, state the agreement that was arrived at.

Mr. Doherty: I might say, your Honor, that this is what happened: We had a conference in the Attorney General's office. It was attended by the State Superintendent and Mr. Rhone and Mr. Walter Bowers, and by Mr. McKenna and Mr. Noon representing the Federal agency, and by Mr. McMahon and I representing the defendant. And Mr. Joe Crail was also present. We discussed the matter from a broad angle, that the state and [5] federal agency shouldn't be in a quarrel over

this, they ought to get together, and it was there arranged that Mr. McKenna and Mr. Noon would meet with Mr. Sparling and have a discussion to see if they could work out some sort of an announcement which would be given to the press and then the action dismissed. This announcement was dictated by Mr. Bowers, as the substance of that arrangement. Mr. Noon and Mr. McKenna promptly stated that it would only be a private arrangement, because it would not be binding upon the federal agency unless the Federal Home Loan Bank Board agreed. I took the position with Mr. Bowers, the Assistant Attorney General, that we could not agree to the state's interpretation of paragraph 1, and that is Mr. Bowers said that all savings and loan associations should in all advertising and publicity fairly state or show that such entity is a, quote, "Savings and Loan Association," unquote.

I took the position that any time that the defendant advertised as "Coast Federal Savings" or "Coast Federal" that it was violating the agreement.

I am reading now from Mr. Bowers' letter to me of August 4th where I brought that up to him. Mr. Bowers said in his letter: "One of the important features which I thought everybody concurred in was that the savings and loan associations in California should in all advertising to be used fairly state or show that such entity was a 'Savings and Loan [6] Association.' As I recall certain ex-

ceptions to this were discussed, such as the fact that the Coast Federal Savings and Loan Association had a large neon sign on the top of the building occupied by it and that it would be very expensive to change that sign, and therefore that was not to be required to be changed, but that future advertising should show that the defendant in this matter was a federal savings and loan association. Since that time I have seen considerable newspaper advertising in which the only statement relative to the advertising entity was 'Coast Federal Savings.' "

And I said to Mr. Bowers if we had agreed to this interpretation of yours, the defendant would have been immediately in default and violating the understanding, and I could not become a party to an arrangement which would mean their interpretation, because all the advertising, all the publicity of the defendant was "Coast Federal Savings." And the Attorney General insisted that it ought to be "Coast Federal Savings and Loan Association," and I could not agree.

The Court: You never got together on that?

Mr. Doherty: Never got together on that. We didn't get together for the reasons that I stated.

The Court: If Mr. Doherty's position is right, that there is no jurisdiction in this court to enforce state statutes against this federal institution, then what I might think of these facts wouldn't make any difference. However, in count 4, [7] which charges the use of the name "Coast Federal Savings," it seems to me I recall the Home Loan Board asking me to prosecute a federal savings and loan

for using only part of their title. Now, if that is the policy, I think the enforcement should be consistent, and it seems to me that there were regulations cited on the use of the title.

Don't you have a regulation that a savings and loan must use its entire title?

Mr. Noon: No. And I have checked that today with the Board attorneys. There is no such regulation.

Mr. McMahon: I believe I checked pretty thoroughly on it, Judge, and the only pronouncement I found was a speech by former Chairman Divers of the Federal Home Loan Bank Board in which he said that, Blank Federal Savings was enough name, because the words "Federal" and "Savings" together would show anyone that it was a federal savings and loan association.

The Court: What was the advertisement that the Long Beach Building and Loan put out in which I was asked to prosecute them?

Mr. Noon: I don't believe I know. If I do, I have forgotten.

Mr. McMahon: Was that part of Fahey against Mallonee?

The Court: No, it had nothing to do with that except as maybe a by-product of it, but it was based on an ad that [8] they ran, and when I checked into it I found that it was an oversight of a printer or somebody.

Mr. McMahon: I remember that, sir. They used the FDIC seal in an ad when they should have used the Federal Savings and Loan Insurance Company

seal, and they later said that it was an oversight of the printer. That may be the one.

The Court: That may be it. I didn't prosecute them but I remember that your agency was bird-dogging these building and loans and making them live up to whatever those regulations were. I had the impression, however, that they had omitted part of their title in that ad. Maybe not.

Mr. Doherty: Even so, your Honor, we contend that the federal agency is the one to enforce that and not the state agency.

The Court: How about trying this case next week and having it out of the way?

Mr. Rhone: I can't do it.

The Court: I have some open time, a case is blowing up here.

Mr. Rhone: I am preparing a brief for the Circuit Court, and they have given me a warning that I have to get the brief in on time, no extensions.

Mr. McMahon: One difficulty is that Joe Crail leaves tonight for Washington. [9]

The Court: What would he have to be here for in the trial of this case?

Mr. Doherty: There is nothing to try, your Honor.

The Court: There is not very much to try. You bring in the advertisement, the pictures of the bank—I intend in this pre-trial order to have you gentlemen agree on these facts, as to what these advertisements are. I think you ought to be able to agree on practically every count, what has been done here,

and then it is just a question of law applied to those facts.

Isn't that the way you look at it, Mr. Rhone?

Mr. Rhone: I think that is true, and we intended to set the thing up that way when we drafted it.

The earliest open time I will have is the week of December, about 18th or 19th.

The Court: If we get together on a pre-trial stipulation with the facts pretty well agreed upon, is there any reason why this couldn't be tried some Monday afternoon? It would be just a matter of seeing that the record was complete and then arguing it a little bit. You have got all your briefs filed on the law as both sides see it.

Mr. Rhone: I think it could, except I think we have some more briefing to do on this question of alleged federal instrumentality.

The Court: You filed a pre-trial brief here, [10] didn't you?

Mr. Rhone: Yes, we did, but we would like to brief it further.

The Court: I think the case ought to be tried and disposed of.

How about Monday afternoon, December 18th?

Mr. Rhone: That is all right. I won't get the amount of briefing done that I ought to.

The Court: That is five weeks ahead.

Mr. Rhone: That's right. I have this brief I mentioned, I have two petitions for hearing in the State Supreme Court, and I have a mandamus suit with the City Board of Education against the——

Mr. Doherty: And we have a new Attorney General coming in.

Mr. Rhone: I have to get this all done.

The Court: Haven't you a young fellow over there who could do it?

The Clerk: Your Honor, you will have contested naturalization that afternoon. That is the third Monday in the month? Do you have that marked down? It might turn out that we will only have one or two.

The Court: Well, that won't be a good day, then. I have pre-trials, law and motion, and those contested matters. I couldn't hear it on that day. Let's put it on January 8th. [11]

Mr. Doherty: I have got a flock of cases, your Honor, that have got me jammed in the whole month of January. I am now getting cases continued out. There are three duplications in January on cases that I have. I was going to suggest a shorter method for it. If the Attorney General and I decide to agree on a stipulation of facts and then submit it to your Honor, with such memorandum of authorities as we wish, then you could try it yourself when your calendar permits it.

The Court: That would be workable, except Mr. Rhone has raised the point that he wants to file another brief, and he has wanted at least a month to file that brief. So that puts us over to about the 18th, here, of December, and then we have the Christmas holidays coming in, so we will either have to go into February to accommodate you, or we will have to drop back into the earlier part of December.

Mr. Doherty: I have been wondering about his point. If the court should find with us on the facts, that the word "Bank" is no longer being used, No. 1, and, No. 2, that "Coast Federal Savings" in no way misleads the public, then it is immaterial as to which agency has control, federal or state, because there is no issue before the court. If the court should find that the words "Coast Federal Savings" constitute improper advertising, then the question of which agency has jurisdiction, the state or the federal, would then [12] become material. In other words, if your Honor should find as a matter of fact that "Coast Federal Savings" is not misleading, is not representation of a bank, or an inducement or holding out to the public that it is a bank, and there should be evidence to support that, then the issue of whether the federal agency has jurisdiction or state would be out of the picture. If your Honor should hold that "Coast Federal Savings" is a misrepresentation to the public or in some way violates the law of the state, then the question of which agency has jurisdiction would become paramount, we contending it is federal——

The Court: If the court should determine that it had no jurisdiction over the matter, even if the language were misleading, that would dispose of it without going into the factual matters.

How much time do you want to write the brief? Do you feel you need a month or six weeks?

Mr. Rhone: I have this dispute that I am writing a brief on in the Circuit Court, and that has

to be filed December 2nd. I have two petitions for hearing in the State Supreme Court, and they have to be finished by December 5th on one, and the 13th on the other. And this mandamus case involving \$212,000 with the school board.

The Court: How about going into February? How about February 12th in the afternoon? [13]

Mr. Doherty: That is Lincoln's Birthday.

The Court: It is not a holiday over here, unless you gentlemen want to take it.

Mr. Doherty: No.

Mr. Rhone: We can't complain about it. We lose it, and that's all.

The Court: February 12th at 2:00 p.m. That is for trial.

Mr. Doherty: Thank you, your Honor.

The Court: Now, I want you to see if you can't get together on a pretrial stipulation whereby it is agreed that up to, whatever date it was, the Coast Federal used the word "Bank" as shown by photograph exhibit so-and-so attached to the complaint; that after such date the word "Bank" was not used in that size but was used in the size—don't you have another photograph?

Mr. Doherty: We can have one if it is now being used.

The Court: On the second cause, that it is probably true that the Coast Federal uses this ad shown on page 4 of the complaint about "Place your savings at Coast Federal for safety, for higher return, convenience, availability," and so forth. It seems to me that ought to be stipulated to.

Mr. Rhone: I think that was admitted in the answer.

The Court: Then there would be the issue of whether that had been put forth by Coast Federal for the purpose of [14] misleading, and whether it did actually mislead the public. That would still be an issue of fact.

Then in count 3 there is the allegation that the defendant solicited and received deposits and transacted business in the way and the manner of a bank and savings bank.

Mr. Doherty: That part we can't agree to.

The Court: Can't you agree on what you do, the facts?

Mr. Doherty: It can be agreed simply on the facts that we don't want commercial deposits or short-time deposits, and anyone that offers us a short-time deposit or checking account, we refer them to banks.

The Court: I think what the plaintiff has in mind there is they have a cage and teller, and somebody comes in and puts his money through a cage and gets a receipt. Is that what you have in mind with that allegation?

Mr. Rhone: We have in mind that they carry on, not business as a commercial bank, but business as a savings bank, and it has all the indications of a savings bank with a savings bank book, and receiving deposits and so on.

There has never been any contention that they do business as a commercial bank. We do not contend they ever have done or are threatening to.

The Court: Maybe you will be able to get together on count 3.

In count 4 there is the contention that the defendant [15] has held itself out as Coast Federal Savings.

Now, there is no dispute about that, is there?

Mr. Doherty: We admit that.

The Court: You ought to be able to get together on that.

Count 5 seems to be a recap of everything else.

I will ask that the plaintiff prepare that pre-trial stipulation and order. It will consist of one portion where you get together on as many facts as you can, and, secondly, where you outline what issues remain to be tried. Apparently there still would be some issues that would have to be tried, at least in the sense of drawing conclusions from what facts you have. You have the allegation that the defendant used the word "Bank" and so forth for the purpose of misleading the public. You don't intend to offer any evidence from the public on that, do you?

Mr. Rhone: No.

The Court: Just a question of what inference you would draw?

Mr. Rhone: A question of what inference the court would draw from the facts.

The Court: All right. If you want to file briefs, I think you ought to have your brief in by—I think the plaintiff ought to have its brief in—how much time would you want to look the brief over and reply to it? [16]

Mr. Doherty: If he gets the brief in by January 15th, would that be out of line?

Mr. Rhone: That is satisfactory.

Mr. Doherty: That gives you plenty of time on your Christmas holidays, and we could reply in two weeks. If we took two weeks after January 15th, that would give the court 10 days before the hearing.

The Court: All right. Brief to be filed the 1st of February, by the defendant.

Your pre-trial stipulation, how much time do you want on that? To January 15th on that, also?

Mr. Rhone: It should be either January 15th or 8th.

Mr. Doherty: It should be earlier, Mr. Rhone, because what you submit may need some modification by us.

Mr. Rhone: How about the 8th?

The Court: All right. January 8 to file your pre-trial stipulations.

Thank you very much.

Mr. Bailiff, call the people in the Loew's [17] case.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of November A.D., 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed September 25, 1951.

Monday, February 12, 1951. 2:00 P.M.

(Other court matters.)

The Court: Call the next case.

The Clerk: No. 10528-C, Civil People of the State of California, and others, v. Coast Federal Savings & Loan Association, for trial.

Mr. Rhone: Ready.

Mr. Doherty: We are ready for the defendant, your Honor.

Mr. Rhone: Mr. McMahon, did you hand the clerk the stipulations?

The Clerk: Yes.

Mr. McMahon: I have already handed them to the clerk.

The Court: Will you give me time to read this stipulation? It was just handed to me.

Mr. Rhone: I might state that we have a little additional evidence that we could not agree on.

Mr. Doherty: May the record show, your Honor, preliminarily, that although the stipulation is submitted, that is, the stipulation of facts, it is done so on the part of the defendant with the reservation

and the objection that the plaintiff has no authority to institute this action, that the complaint does not state a cause of action entitling them to any relief, that the acts complained of are those [3*] solely within the jurisdiction of the Home Loan Bank Board, and not within the provisions of the plaintiff; that any act of the State of California which is in contravention of the federal act is null and void in so far as it applies to the operation of the Coast Federal Savings and Loan Association, is incompetent, immaterial and irrelevant, and that it is an attempt on the part of a State agency to interfere with the operation of a federal agency over which the State agency has no jurisdiction.

Mr. Court: Mr. Clerk, may I see the original file?

Your stipulation talks about the signs which appear as Exhibit A, copies of which are attached to the complaint.

As I recall, they weren't attached to the complaint, and subsequently they were filed with the understanding that they would be considered as part of the complaint. I am just wondering where they are in the file. Do you remember how we got them into the file? I find the stipulation and order filed March 17, 1950, which has the pictures. I suppose your stipulation is all right. You say "attached as Exhibit A to the complaint," and the stipulation, I believe, makes them part of the complaint.

Mr. Rhone: It was my understanding that they

* Page numbering appearing at top of page of original Reporter's Transcript.

were actually attached to the original complaint, but when the matter was transferred to this court there had to be another copy of the complaint filed, and it was not attached to that copy. [4]

The Court: All right.

Mr. Rhone: Mr. Sparling, take the stand, please.

MAURICE C. SPARLING

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Maurice C. Sparling.

The Clerk: S-p-a-r-l-i-n-g.

The Witness: That's correct.

Direct Examination

By Mr. Rhone:

Q. What is your business or occupation?

A. Presently I am State Superintendent of Banks of the State of California.

Q. How long have you held that position?

A. Since December, 1945.

Q. Mr. Sparling, I wish to call your attention during the latter part of December, 1948, did you hear a radio broadcast of the defendant Coast Federal Savings and Loan Association?

A. I did.

Q. And can you identify the time about when that was?

A. I heard many of them, but the one you par-

(Testimony of Maurice C. Sparling.)

ticularly have reference to was, in my opinion, shortly prior to — [5] sometime prior to December 28th.

Q. And do you know what station it was?

A. No, sir, I do not. Some local station.

Q. Do you mean a Los Angeles station?

A. Los Angeles or Beverly Hills, I don't know.

Q. That was December of what year?

A. 1948.

Q. Can you tell us briefly the substance of that advertisement as you heard it on the radio?

Mr. Doherty: If the court please, at this time I wish to enter the same objection I heretofore made to this testimony. I will not ask your Honor to make a ruling at this time. If your Honor desires, you may withhold your ruling, and then at the proper time, at the conclusion of the testimony. I wish to make a motion to strike the testimony on the grounds I have heretofore stated.

The Court: The objection you made today when the proceedings started, that is the one you are incorporating by reference?

Mr. Doherty: Yes, the objection I made with respect to the agreed statement of facts, that they were submitted here subject to the objection I made, and any testimony of this witness—I wish to have a continuing objection to anything that he testified to, a ruling as your Honor determines either now or at the conclusion of his testimony, and then [6] with the opportunity on our part to make a motion to

(Testimony of Maurice C. Sparling.)

strike the testimony on the grounds set forth in our objection.

The Court: I understand. I will overrule your objection and reserve to you the right to move to strike it at the conclusion of the case.

The Witness: The radio advertisement was to the effect of urging the public to deposit their money with Coast Federal Savings, and in that broadcast reference was made to the banking office of Coast Federal Savings at 8th and Hill Streets, Los Angeles.

Q. (By Mr. Rhone): After you heard that did you have any communication with reference thereto with the defendant? A. Yes, sir, I did.

Mr. Doherty: I understand, your Honor, we have a running objection to all this testimony?

The Court: You do, you have a running objection to the entire line of testimony.

Q. (By Mr. Rhone): Mr. Sparling, I show you the original of a letter on the letterhead of the State Banking Department, San Francisco, December 28, 1948, to Mr. Joe Crail, President, Coast Federal Savings and Loan Association, and ask you is this the letter that you have reference to that you sent?

A. Yes, sir, it is.

Q. Without going into this entire letter, would you read that portion of the letter into evidence which relates [7] particularly to the radio broadcast that you have previously testified to?

A. The second paragraph of the letter reads as follows, or a portion of it:

(Testimony of Maurice C. Sparling.)

“Comment has been made that in your radio broadcasting you refer to your ‘banking’ office

* * * .”

That is not the complete sentence, but that is the part to which I have reference.

Q. My attention has been called to the fact that you mentioned the address of the defendant as at 8th and Hill, or 9th and Hill—or what was the address?

A. 8th and Broadway, I should have said. I believe I said 8th and Hill. I should have said 8th and Broadway, Los Angeles.

Q. Did you receive a reply to this letter?

A. Yes, sir, I did.

Q. Mr. Sparling, I show you a letter on the letterhead of Coast Federal Savings and Loan Association, Los Angeles, dated January 24, 1949, to Mr. Maurice C. Sparling, Superintendent of Banks, and signed “Cordially yours, Joe, Joe Crail, President.” Is that the reply that you received?

A. Yes, sir, it is.

Q. Does that letter and did your letter to Mr. Crail cover other matters than the matter of the radio broadcasting? [8]

A. Yes, sir, they did.

Q. Will you read to us the portion of that letter which relates particularly to the radio advertising?

A. The fourth paragraph of the letter from Mr. Crail reads as follows:

“In regard to the facts, you are informed that we

(Testimony of Maurice C. Sparling.)

refer to 'banking offices' in our radio broadcasting. We have no record of having used the term in our advertising. I have never heard it used, although we did have a complaint from the Better Business Bureau that in our house organ of October 1st a story mentioned that we were moving into the banking quarters vacated by the Federal Reserve Bank at 9th and Hill. I am enclosing a copy of our house organ. The advertising man says he has no record of using the terms 'banking office' or 'banking quarters' in radio advertising. However, it would be possible that such term was included in padding one of our announcements to fill up the longer time of a commercial on a small station. Since there is no law against it and no misrepresentation it could have gotten by without anyone's thought."

Mr. Rhone: You may cross-examine. [9]

Cross-Examination

By Mr. Doherty:

Q. Captain Sparling, you read here a portion of the second paragraph of the letter of December 28, 1948. I believe you read just the sentence where it said, referred to "banking office." May I read the entire paragraph? A. Surely.

Q. Reading the second paragraph of the letter of December 28, 1948:

"Comment has been made that in your radio broadcasting you refer to your 'banking office' and we are informed that the large windows of your

(Testimony of Maurice C. Sparling.)

ground floor offices carry the inscription, 'Member Federal Home Loan Bank,' with the words 'Member Federal Home Loan' being in comparatively small letters while the word 'Bank' appears in disproportionately large letters—apparently intending to emphasize the word 'Bank' in connection with your association."

I have read it correctly, haven't I?

A. Yes, sir.

Q. Captain, you stated you had heard these advertisements several times on the radio?

A. No, sir. I think you misunderstood. I said I had heard advertisements of Coast Federal Savings and Loan Association [10] many times referring to themselves as Coast Federal Savings, but this radio broadcast, to my recollection I only heard it once or possibly twice.

Q. In connection with the bank?

A. In connection with using "banking office," yes.

Q. Were you specializing in listening to advertisements on the radio about that time?

A. Not any more than necessary, no, sir.

Q. And you deemed it necessary to check the Coast Federal Savings advertisements on the air about that time?

A. No, sir, I did not. It was only in connection with some other program that either concluded or began, and in the in-between period there would come an advertisement, as there is today, of the

(Testimony of Maurice C. Sparling.)

Coast Federal Savings and Loan Association. I wasn't listening for any such advertisement.

Q. Were you familiar at that time that the Coast Federal Savings was a member of the Federal Home Loan Bank?

A. I assume so. I had made no research into it, but I assume that unquestionably they were.

Q. And your complaint is you thought that using the word "bank" even in connection with the words "Member Federal Home Loan Bank" was violating the State law?

A. By no means, no, sir, not at all.

Q. Your complaint was that you thought that the word "bank" was emphasized or over-emphasized? [11]

A. In connection with what I refer to there, yes, very definitely.

Q. But anybody who read the advertisement or the sign or notice on the building would read the entire sentence, would they not?

A. No, sir, in my opinion they would not, they wouldn't be able to see the rest of it, all they would be able to see would be the word "Bank."

Q. From what distance did you read it?

A. I never did read it.

Q. Then you don't know what was on the building?

A. Only from photographs that I had made and reports made to me by many, many others.

Q. And those are the photographs that are set forth in the complaint?

(Testimony of Maurice C. Sparling.)

A. No, sir. Those set forth in the complaint were taken afterwards. I had had some others before.

Q. After this had been called to your attention did not you take the matter up with the representative here of the Federal Home Loan Bank?

A. I believe not. If I recall correctly, I did not do so. The matter was invited to my attention, I believe, by the Better Business Bureau of Los Angeles. I may be mistaken in that. But I know it came from some outside source that it was first invited to my attention, this sign on the building [12] emphasizing the word "Bank." In that connection, from across the street it was portrayed to me that the word "Bank" stood out and you couldn't read the other part of it. I didn't personally see it, and I never saw it from across the street either, but it was about that time and just prior to that that I heard the radio broadcasting referring to "banking office at 8th and Broadway," also.

Q. Didn't you learn later that the Federal Home Loan Bank representative had requested Coast Federal Savings to make the letters more in harmony with each other, in other words, the words "Federal Home Loan" and "Bank" to be about uniform in size?

A. That may have been so. The Better Business Bureau kept in touch with me about it, and I think they told me that they had also reported to the representatives of the Federal Home Loan Bank, and at first hadn't received any support on the matter.

(Testimony of Maurice C. Sparling.)

but later I think Mr. Crail told me personally that he was making that change.

Q. That was about how long before you filed your action?

A. Well, I don't know. I had taken the matter up, I believe, of filing the action with the attorney general's office prior to the time the change was made or prior to the time I knew it was going to be changed. I don't recall definitely when the action was filed. [13]

Q. The action was filed, I believe, in November, 1949.

A. Well, then it would be from December 28, 1948—that may have been the second letter to Mr. Crail, I don't know, I wrote him more than one letter, I believe, but if that is the first letter, then it would be from the period December 28, 1948, to November, 1949, when the action was filed, approximately nine months, or eleven months later that the action was filed.

Q. And you heard no complaints—rather, you know of no other instances between December, 1948, and November, 1949, where the word “bank” was emphasized in its name on the building, or used in radio or other advertising?

A. No, sir, not after the change was made, and I think it was made—I don't know the date, but I imagine probably along in January or February of '49, and after that I did not hear any such complaint, no, sir.

Q. How many members of the public who had

(Testimony of Maurice C. Sparling.)

done business with Coast Federal Savings had come to you and reported that they had been deceived by going in there thinking it was a bank and leaving their money there with the impression that it was a bank, only to find out it was a savings and loan association?

Mr. Rhone: I object to that as immaterial.

The Court: Overruled. I don't know how much probative weight it has. [14]

The Witness: I don't know. I received complaints, I received a written one just on last Friday, they didn't mention the Association, but the party had said that he had put money into it thinking it was a bank, and then later found out it was a building and loan association, and how could he get his money out and what-not. Whether any of them related to the Coast Federal Savings & Loan Association, I don't know.

Q. (By Mr. Doherty): You don't know of any complaint of your own knowledge that was ever made to you respecting Coast Federal Savings where the depositor or customer or certificate holder had been misled in putting his money in there on the assumption and belief that he was depositing it in a bank, in the so-called common accepted use of the word.

A. I don't know definitely. The first complaint that came to me was a cumulative one from the Better Business Bureau, and I don't know of any individual coming to me. They wouldn't ordinarily do so.

(Testimony of Maurice C. Sparling.)

Mr. Doherty: I think that is all, Captain.

Mr. Rhone: That is all.

The Court: Thank you. You may step down.

Mr. Rhone: Plaintiff rests.

Mr. Doherty: If your Honor please, in order to complete the record we would like to introduce in evidence—we [15] couldn't cover it by the stipulation of facts or agreed statement of facts—these various documents, namely, the certificate that is issued by the Coast Federal Savings to one who is a customer, the pass-book that is issued to them, the document they signed, the contract they signed when they became a member. It will only take just a few moments.

The Court: Probably there is a stipulation that these are those documents? How about it, Mr. Rhone?

Mr. Rhone: I suppose, but I haven't seen them. I have asked for them, though.

Mr. Doherty: I am violating the rules, your Honor; I am calling an attorney as a witness, and they make the most terrible witnesses under the sun. I am calling Mr. McMahon.

The Court: Mr. Sparling didn't hear what you said. We will exempt him from that broad statement.

You may take the stand, Mr. McMahon.

HARRY C. McMAHON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Harry G. McMahon. [16]

Direct Examination

By Mr. Doherty:

Q. Mr. McMahon, you are also attorney of record in this case? A. I am.

Q. What connection have you with the Coast Federal Savings and Loan Association, the defendant here?

A. I am sometimes attorney for Coast Federal Savings and Loan Association.

Q. And are you familiar with their practices and their business conducted over at their office in Los Angeles? A. I am, sir.

Q. And were you during the years 1948 and '49 and '50 and up to this time in 1951?

A. I am familiar with their practices from January 3, 1949, down to the present. I have examined the practices before that date, but I was not acting as attorney for them.

Q. I am going to hand you some documents here and I want you to pick out all those that have to do with opening an account at the Coast Federal Savings.

The Court: Start at the beginning and give us the chronological order.

(Testimony of Harry G. McMahon.)

Q. (By Mr. Doherty): Yes, take the order in which the business is transacted. [17]

A. I shall start with the person coming in Coast Federal. He is usually met at the door by a person there for that purpose who asks what his business is, what he is interested in. If he says he is interested in opening an account, he is directed to the New Account section. He is then introduced to a young lady or young gentleman whose business it is to open new accounts——

Mr. Rhone: May I interpose an objection at this time? I wish to strike the answer for the purpose of making an objection, and my objection is that this material is all entirely immaterial and outside the issues in this case. The issues in this case simply are whether or not the defendant is holding itself out as a bank or representing to the public it is a bank, and it is not a question of mechanics of the internal operation of the business.

The Court: You have alleged in your complaint that they are conducting business as a bank, therefore one of the issues under the pleadings is how are they conducting business. I think it is probably material. The objection is overruled.

A. (Continuing): The first question the new account taker asks of the customer is to determine whether they are interested in an investment certificate type of investment which is only issued in \$100 amounts. No pass-book is given, but a share similar to a stock certificate is given. [18]

(Testimony of Harry G. McMahon.)

The Court: Let's mark that as Defendant's Exhibit A.

You may have a running objection to this line of testimony and the exhibits, Mr. Rhone.

Mr. Rhone: Thank you.

The Court: The certificate will be marked as Defendant's Exhibit A, received in evidence.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

The Witness: With the certificate dividends are mailed at the close of the dividend period to the investor. The investor may be interested in a pass-book account, savings account, or as it is also called, a savings share account, in which case this pass-book is issued to the investor.

The Court: Mark the pass-book Defendant's Exhibit B, and receive it in evidence subject to the understanding with reference to the objection.

(The document referred to was marked Defendants' Exhibit B, and was received in evidence.)

The Witness: Once the type of investment is determined, the employee of Coast Federal determines which type of account would best suit the wishes of the investor. There are trust accounts that are the same as, really, a Totten trust.

Q. (By Mr. Doherty): Follow the procedure right through, Mr. McMahon.

(Testimony of Harry G. McMahon.)

A. May I ask a question? [19]

Q. The question is the procedure that is followed by your company, the matter of transacting business, when a prospective customer comes into your institution. You have already said he comes in and if he wants \$100 or more you have Exhibit A, then you have another account that is known as Exhibit B; now what else is done by your institution there, the defendant, with the customer, what other documents does he sign, if any, in connection with his account?

A. The customer may sign any one of several types of signature cards. There are several types of signature cards, because there are several types of accounts. One is the account I have mentioned, a Totten trust, there is an individual account, there are joint accounts, and there are corporate savings accounts.

The Court: Do you have the signature cards there?

The Witness: I do.

The Court: Can't we mark all the signature cards as Exhibit C? Don't they speak for themselves as to what they are, or would you like them marked separately?

The Witness: I am missing one, but it isn't important. I believe the individual signature card is typical. It reads: I hereby apply for membership and a (Certificate) (Savings) account in the Coast Federal Savings & Loan Association of Los Angeles and for the issuance of evidence of membership. * * * [20]

(Testimony of Harry G. McMahon.)

The Court: The signature cards handed to me by the witness will be marked Exhibit C and received in evidence

You seem to have one duplication in here.

Mr. Doherty: The one handed your Honor is the one that the witness just read from.

The Court: Yes. Mark them as Exhibit C, received in evidence subject to the previous objection.

The Clerk: Five of them.

(The documents referred to were marked Defendant's Exhibit C, and were received in evidence.)

Q. (By Mr. Doherty): What you are saying, Mr. McMahon, is if a corporation comes in they sign one type of card, if it is a joint account another, an individual account another, and so forth?

A. That is correct, sir.

Q. But the contents of each of the cards is as set forth in the Exhibit C that has now been introduced?

A. That is correct, sir.

Q. What else is signed by the customer?

A. At that time nothing else is signed.

Q. When is the document signed that is now before you here?

A. The signature cards, as are the seven or eight documents immediately before me, are signed before an account is opened. [21]

The Court: Now, we have got some signature cards in evidence as Exhibit C. That is just the same sort of thing, isn't it?

(Testimony of Harry G. McMahon.)

The Witness: Yes.

Mr. Doherty: May I look at C? I didn't see all of this.

Yes, your Honor, it is part of C.

Q. (By Mr. Doherty): What type of accounts are given pass-books?

A. Any one of the several types of accounts offered are given either to the holders of a pass-book account or an investment certificate account.

The Court: That isn't quite clear. Do you mean whether the person has an investment certificate account or whether they have a pass-book account there has to be one of these signature cards signed up?

The Witness: Yes.

The Court: But Mr. Doherty asked you what kind of an account was it where you gave a pass-book to a customer.

The Witness: We will give a pass-book to any one of the several types of account.

The Court: You wouldn't give a pass-book to a person who held an investment certificate, would you?

The Witness: No. In my mind I have grouped accounts as to trust, joint, single name, and so on. I think that is [22] where my confusion results.

Q. (By Mr. Doherty): Mr. McMahon, I will show you a document issued by the Federal Savings and Loan Insurance Corporation.

I think your Honor will take judicial notice that

(Testimony of **Harry G. McMahon.**)

that insurance corporation is part of the Federal Home Loan Bank Act.

The Court: The court is familiar with that, the statute and the corporation that exists.

Mr. Rhone: Which part of this do you have reference to, Mr. Doherty?

Mr. Doherty: Counsel has asked me what part I have reference to. Your Honor, to save time I am directing his attention to part of page 5 and page 8, just some particular items on those. I can introduce the whole matter, but it will encumber the record.

Q. (By Mr. Doherty): I will first show you, Mr. McMahon, this document and ask you from what source you got this.

The Court: This will be barked Exhibit D for identification, the document you are talking about.

(The document referred to was marked Defendant's Exhibit D, for identification.)

Q. (By Mr. Doherty): I am referring to D, for identification; to your knowledge who issues this document?

A. It states on the face of it that it is issued by [23] the Federal Savings & Loan Insurance Corporation.

Q. Washington, D. C.?

A. Washington, D. C.

Q. And it is instructions respecting advertising, is it not?

A. That is correct, sir.

Q. I will direct your attention to page 5 designated as Exhibit 1, and to the following:

(Testimony of Harry G. McMahon.)

“Insured Savings Accounts,” “Are your savings insured against loss?” “Save where savings are insured,”——

Mr. Rhone: Mr. Doherty, did you want to read that whole page into the record?

Mr. Doherty: No. I am just reading two or three. You can read it all, if you want to. I will do what your Honor suggests. I am reading just a couple of highlights out of it for the record.

The Court: I don't care, whatever you want to do. Do you want the whole page, Mr. Rhone?

Mr. Rhone: No, I just thought it would be more accurate to get a whole page, or something like that.

Mr. Doherty: Then, your Honor, I will offer the next exhibit in order, Exhibit D, without being just for identification.

The Court: All right. Received as Defendant's Exhibit D. [24]

Do you want the whole document received, or just pages 5 and 8?

Mr. Doherty: Let the whole document in. It is directions from that organization to the members on how to handle their business.

Mr. Rhone: What is the title of the document?

The Court: It is entitled “Suggestions for Federal Savings and Loan Associations in giving information to the public.”

At the bottom it says, “Issued by Federal Savings & Loan Insurance Corporation, Washington, D. C.”

(Testimony of Harry G. McMahon.)

(The document, heretofore marked Defendant's Exhibit D, for identification, was received in evidence.)

Q. (By Mr. Doherty): I will now show you, Mr. McMahon, another document—I will first show it to counsel—entitled “Charter and Bylaws of Coast Federal Savings and Loan Association,” and ask you if that is a document that is issued by the defendant?

A. That is issued by the defendant.

Q. What is done with that with respect to a customer when the customer comes in and signs up those contracts that are now in evidence?

A. That is made available to every customer when an account is opened.

The Court: We will mark that Exhibit E and receive it [25] in evidence. And I take it, Mr. McMahon, that that Exhibit E is a copy of the charter and bylaws of the Coast Federal?

The Witness: That is correct.

(The document referred to was marked Defendant's Exhibit E, and was received in evidence.)

Q. (By Mr. Doherty): Does each and every customer get a copy of this charter?

A. I cannot swear that each and every customer does. I would rather say that most of them do. It is offered to all, but one may not take it.

Q. In other words, it is offered to them?

A. Yes.

(Testimony of Harry G. McMahon.)

Q. Are there any other documents there that a customer uses or is given to a customer, or a customer signs, in connection with doing business with your association?

A. There are two other documents offered to a customer at the time a new account is opened. One is the financial statement as of the last dividend period of Coast Federal Savings and Loan Association, the defendant. This is a typical financial statement. It is headed "Coast Federal Savings and Loan Association."

The Court: Mark that Exhibit F and receive it in evidence, subject to the running objection of the plaintiff.

(The document referred to was marked Defendant's Exhibit F, and was received in evidence.) [26]

The Witness: The other document is entitled on its face "Security for your savings Coast Federal Savings."

The Court: What is it?

The Witness: It is promotional material that gives the history and a short explanation of Coast Federal Savings and Loan Association.

The Court: Receive it as Exhibit G in evidence subject to the same objection.

(The document referred to was marked Defendant's Exhibit G, and was received in evidence.)

(Testimony of Harry G. McMahon.)

Q. (By Mr. Doherty): What other documents or contracts does a customer sign when they first do business with you, open up an account?

A. In addition to what I have already mentioned the customer will sign one of two types of ledger cards. If the customer opened an investment certificate type of account his specimen signature will be put on the investment share account ledger card, which is kept in the records of the Association.

The Court: Do you have a copy of one there?

The Witness: Yes, I have.

The Court: Mark it H, and receive it in evidence, Defendant's H, and subject to the same objection.

(The document referred to was marked Defendant's Exhibit H, and was received in evidence.) [27]

The Witness: If the customer invests his money in a savings share account he will sign the savings account ledger card, and that will be kept in the records of the Association.

The Court: Do you have one there?

The Witness: I have one.

The Court: Mark it I, and receive it in evidence, Defendant's Exhibit next in order. The plaintiff may have the same objection.

(The document referred to was marked Defendant's Exhibit I, and was received in evidence.)

(Testimony of Harry G. McMahon.)

The Witness: There are one or two other documents signed during the course of business, but I don't feel it necessary to go into them.

Q. (By Mr. Doherty): You have one there where someone loses a pass-book, you sign an affidavit; is that correct? A. Yes.

Mr. Doherty: I don't think that would be pertinent here, your Honor. That is merely the exception when they lose the pass-book. Except if counsel wants it.

Mr. Rhone: I don't want it.

Q. (By Mr. Doherty): Mr. McMahon, does any customer or anyone doing business with the Coast Federal Savings, leaving money there, depositing there, or whatever relationship you may indicate, sign any contract or have any [28] arrangement where the relation of debtor and creditor exists between Coast Federal Savings and the customer?

A. Not with——

Mr. Rhone: Just a minute. I object to that as calling for a conclusion of the witness. I think we have the documents in evidence. He may be asked if they sign any other documents.

The Court: Read that question, Mr. Reporter.

(The question was read by the reporter.)

The Court: Of course, that comes almost being one of the ultimate question, if plaintiff has any right of recovery, if it is a debtor-creditor relationship—skipping over the question of the authority of the State to interfere with the federal instru-

(Testimony of Harry G. McMahon.)

mentality—if there is a debtor-creditor relationship, then there is a bank.

I am going to sustain the objection.

Mr. Doherty: I agree with your Honor.

Q. (By Mr. Doherty): Mr. McMahon, are there any other documents or contracts signed between Coast Federal Savings and anyone doing business with it, that is, investing money there, leaving money there, or savings, other than those that have been introduced in evidence?

A. No, sir.

Mr. Doherty: Cross-examine. [29]

Cross-Examination

By Mr. Rhone:

Q. Mr. McMahon, do you know the percentage of people that invest money in Coast Federal Savings and Loan Association who do so by securing an investment certificate rather than a pass-book?

A. Not of my direct knowledge, no. I can give you my impression. I can't answer it of my direct knowledge.

Q. What is your information on it?

Mr. Doherty: May I have the preceding question?

(The record was read by the reporter.)

The Witness: I will give you the source of my information. In the 8th Street office there are 15 tubs of savings share account ledger cards, there

(Testimony of Harry G. McMahon.)

is slightly over one tub and less than two tubs of investment certificate ledger cards. That is as close as I can give it to you.

Q. (By Mr. Rhone): So the other 13 and a fraction tubs are of pass-book accounts?

A. Yes.

Q. And would the same percentage hold with reference to your 9th and Hill Street office?

A. I can't answer that based on any information. I have no information there.

Mr. Rhone: That is all.

The Court: Step down. Thank you. [30]

Mr. Doherty: Your Honor, might I confer with Mr. Crail just a moment in order to shorten the matter?

The Court: Yes.

(Slight delay in proceedings.)

Mr. Doherty: I assume, your Honor, that the court will take judicial notice of the Code of Federal Regulations issued by the Federal Government?

The Court: Certainly.

Mr. Doherty: It is now, under an act of Congress, that after they are published and recorded they become subject to judicial notice, that is my recollection.

The Court: I think so. The matters that appear in the Federal Register, a lot of them end up in the Code of Federal Regulations. There is no ques-

tion about taking judicial notice of it. That isn't, I don't think, subject to proof.

At least I have cited it a lot of times in briefs and never had any evidence in the record to sustain it.

Mr. Doherty: It is my recollection, I may be wrong, that the Act of Congress requires regulations to be put in the Federal Register, and then they ultimately get into the Code, and the Court can take judicial notice of it.

The Court: That is the way I understand it.

Mr. Doherty: Defendant rests, your Honor.

The Court: Any rebuttal, Mr. Rhone? [31]

Mr. Rhone: No rebuttal.

The Court: Both sides rest?

Mr. Rhone: We rest.

The Court: I take it before you rest you want to make a motion to strike the testimony of Captain Sparling?

Mr. Doherty: Yes, before we rest. I now at this time make a motion to strike all the evidence that Captain Sparling has given with respect to what he heard on the radio, what was contained in his letter to Mr. Crail, what was contained in Mr. Crail's letter to him, with respect to the word or use of the words "bank" or "banking office," or that the word "bank" was over-emphasized in size with respect to the rest of the words "Federal Home Loan," on the grounds that it is incompetent, irrelevant, immaterial, without the issues of this case, and that the plaintiff as a state agency has no jurisdiction or control or authority over a

federal savings and loan association, nor can in any way control it, regulate it, or direct its operation, that it is a field in which the Federal Government has preempted all activities, that the matter is subject entirely and solely to the regulations, control and direction of the Federal Home Loan Bank Board, and that the State of California, Superintendent of Banks, has no jurisdiction to control or regulate or direct the business of the defendant in the matters complained of or in any other [32] respect.

The Court: I take it, however, you are not making any objections on the ground of any lack of foundation or upon any ground of hearsay? In other words, you are basing your objection upon the general principle involved in the fact that this Coast Federal Savings and Loan Association, the defendant, is a federal instrumentality?

Mr. Doherty: Yes, your Honor, a federal agency under the control of the Acts of Congress and the regulations of the agency established by Congress, and beyond the power of the State in any way to control, regulate or interfere with it.

The Court: I will reserve ruling on that motion until after I hear such argument as we are going to have.

What are your views on arguing this case?

Let me say this. I wouldn't be honest with you if I didn't tell you what my present thought is in the matter and therefore maybe we can save some time in argument.

My present thought is that my decision in this

case should be for the defendant. I am tentatively in accord with Mr. Doherty's position that this Building and Loan Association is a federal instrumentality, it is not subject to control or supervision by the State of California.

As much as I would like to hear Mr. Doherty repeat those arguments, and learned amicus curiae, Mr. Rosensweig, I think I should tell you what I am thinking about, and any [33] argument that I hear I would like to hear from the plaintiff's side to see whether you can shake me from that position.

Of course, you probably guessed it from the pre-trial. I pretty well expressed myself as to what I thought about the case.

How much time would you want, Mr. Rhone, to present your argument?

Mr. Rhone: Well, I can present my argument now at this time and it will not take over an hour, or we can brief the matter. Frankly, I have not had an opportunity to go through the briefs submitted by general counsel for the Home Loan Bank, and I am not prepared——

The Court: Are you referring to the brief filed by Mr. Rosensweig?

Mr. Rhone: Yes.

The Court: Let's do this, then. We will take a short recess, you confer with counsel and see what your views are on the matter. If you haven't been through that brief, it probably would be more desirable to give you a chance to file a written brief in the case, and give you the advantage of

looking over those authorities before you are either required to argue this matter or proceed further with it. It will be satisfactory to me to let you either argue it in part or very briefly, or waive your argument and file a brief in the matter. You might discuss it with counsel. In the [34] meanwhile we will take a short recess.

(A recess was taken.)

Mr. Rhone: May it please the court, the plaintiff would like to have an opportunity to brief this matter quite thoroughly, particularly in view of the brief filed recently by amicus curiae, and both Mr. Bowers and I have rather a tight schedule, but we believe we can get a brief in within 30 days, therefore we request that we have 30 days within which to file a written brief. We also believe that thereafter if either party thinks that oral argument is required, that the matter should then be set perhaps 10 days later for such oral argument as the court may desire to hear.

Mr. Doherty: Whatever your Honor pleases. I judge it is perfectly right and proper that counsel should have additional time to examine the authorities and give as much aid to the court as possible. If your Honor desires us to file a reply brief, closing brief, or to argue it orally in open court, we are agreeable.

Mr. Sheppard: May it please the court——

The Court: Mr. Sheppard.

Mr. Doherty: Mr. James Sheppard, who is attorney for the California Savings and Loan League.

Mr. Sheppard: That is correct. With the permission of the court and counsel I sat in on the pretrial hearing and have sat in on the trial today. On behalf of the California Savings [35] and Loan League, or on behalf of ourselves as *amicus curiae*, should the matter be submitted on briefs and the court desire authorities, we should like very much to submit a memorandum in support of the defendant's position, on behalf of the California Savings and Loan League. We request permission of the court so to do.

Mr. Rosensweig: The government takes the same position, your Honor; we would like an additional period of time after the State's brief is filed to file additional authorities if we deem it necessary.

The Court: All right. Plaintiff may have to and including March 12th to file a memorandum of points and authorities in support of their position. The defendant may have to and including March 19th to file additional authorities if you deem it advisable. You have filed extensive memorandums already, and I doubt if there is very much law that has not been dug up in this case, but if you find that you have additional authorities that you want to submit you may have to and including the 19th. The government may have to and including the 19th.

Mr. Sheppard's motion to appear as *amicus curiae*, is granted, and if he desires to file a memorandum on behalf of his client he may have to and including March 19th.

Mr. Rosensweig, did you serve copies of your brief on opposing counsel in this case? [36]

Mr. Rosensweig: Yes, I did. I did not serve a copy upon Mr. Sheppard.

The Court: I suggest you give Mr. Sheppard a copy, and then he can have that to look over before he decides whether to file a brief.

Mr. Rosensweig: I will see that he gets one.

The Court: Now, as to your motion——

Mr. Rhone: I think the plaintiff normally has a right to open and close. Since additional briefs may be filed—I had suggested that perhaps the matter be set for oral argument in the hopes that the oral argument would take care of the closing brief, but if there are going to be written briefs, then I think the plaintiff should have an opportunity to close. I was in hopes that would not be necessary.

The Court: Will one week additional be sufficient for you after the 19th?

Mr. Rhone: I think it will.

The Court: To and including March 26th for the plaintiff to reply, if he is so advised.

Mr. Doherty: My understanding is that there will be no oral argument; it will all be on briefs?

The Court: No oral argument unless the court requests it.

As to your motion to strike, Mr. Doherty, I would prefer to rule on that now. We have sort of heard this case on the [37] merits. I see no harm in denying your motion at the present time. I think we meet the same issues with that evidence

in the record that we meet without it in the record, and if your position is correct it is true the court could grant that motion, but I don't see any harm being done in denying it, and I don't like to leave motions like that hanging, because when the matter is under submission I have to dig around and find out just exactly what is submitted. I think the thing is in as good a posture for submission with that in the record as it is with it out of the record.

Mr. Doherty: I made the motion, and I believe it is a good motion——

The Court: I frankly think it is a good motion, and my inclination would be to grant it, but I don't want to grant it without giving counsel a chance to be heard, and if I postpone ruling on it then I have that motion hanging fire. I am going to deny your motion to strike, and leave it in the record. You have a short record and I think you have a record that raises these questions very clearly.

Mr. Doherty: In our closing memorandum, when and if we file it, we will renew our motion to strike, is that the situation then?

The Court: You may if you want to. All right. Anything further?

Mr. Rhone: Nothing further. [38]

The Court: I don't want to appear to be arbitrary, Mr. Rhone, and Mr. Sparling, and Mr. Bowers, about what I said about my view of this case, but I proceed upon the theory that in fairness to counsel a judge ought to tell lawyers what he is

thinking about. And why should I sit and listen to some argument from Mr. Doherty and Mr. Rosen-sweig on a position that I think is correct, rather than tell you very frankly that I am inclined to rule against you and put the burden upon you to convince me otherwise.

I don't mean by that that I wouldn't change my mind. You might present some matters to me that would cause me to change this tentative position. But, as I indicated at the pre-trial and indicated here, it seems to me that you have here a government instrumentality created by federal statute. If that type of instrumentality could be regulated and supervised, complained of, by the State, you would have all sorts of confusion.

There is a way in which irregularities can be controlled. The Federal Government has power, has considerable power. Some of that power is being tested out in the case of *Mallonee v. Fahey*, the right of seizure if necessary. I have in mind, also, other cases. It seems to me there is a string of cases that I ran onto involving post exchanges which were held to be instrumentalities of the Federal Government and were not subject to certain State action. I [39] think there may be some exception in the field of taxes. I don't think you could make a broad statement if you tried to include in it the matter of taxes, but it seems to me, if I recall correctly—I might be wrong—that a post exchange was held to be a federal instrumentality.

Your suit alleges and you have offered proof in

your stipulation attempting to show that the public was misled.

I don't think the public is misled in going to a savings and loan when they put money in there. I think they know they are not going to a bank. I will wager that very, very few people, if any, have ever gone into a building and loan and asked for a loan, which is a typical thing they do at a bank. I think they have gone to building and loans and said, "Here is some money I want to put on deposit," or "I want a certificate or a pass-book," and I think the federal statute contemplated this was a method of saving.

In the Finnegan case, 97 Fed. 2d, they had before the court the question of the welfare clause and discussed the fact that the government might set up these institutions.

It seems to be a pretty strong case in favor of defendant's position.

To a certain extent they may compete with banks, but I don't think any of the banks in the State of California have suffered great economic detriment from the competition of building and loans. The field is amply broad for both of [40] these types of institutions.

Those, generally, are my views on this matter. I think you have a government instrumentality, the federal statute created it, and I don't think a State can step in and attempt to supervise it or complain of the way it operates.

Even if we had a case in which this building and loan was advertising, "We are a savings bank,"

omitting all reference to its character as a federal instrumentality, I don't think your remedy would be in this kind of proceeding. I think representations could well be made by the Commissioner of Banks to the Home Loan Bank Board in Washington, D. C., and I wouldn't be surprised if there wouldn't be some very strong action—it would be a matter of comity to the State of California—to cure that kind of ill. But I don't think the State has authority to reach a problem of that sort in this kind of a proceeding.

My present inclination would be to find that the public are not deceived; to find that although the defendant has done the things which are shown in the stipulation, exhibited the sign, used the name "Coast Federal Savings," that it has conducted the type of business contemplated by the Federal statute, and my present inclination would be to render a judgment on the merits as well as on the law against the plaintiff and in behalf of the defendant.

Anything further? [41]

Mr. Rhone: Nothing further.

Mr. Doherty: No, your Honor.

The Court: Thank you for your co-operation in boiling this case down to its real essence. There is very little dispute of fact as to what went on here. If I am wrong, of course I can be reviewed very easily. [42]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of February, A.D. 1951.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed September 4, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 141, inclusive, contain the original Petition for Removal of Action and exhibits thereto; Notice of Petition for Removal; Answer to Complaint; Pre-Trial Memorandum of Defendant; Memorandum of Plaintiffs' Views for Informal Pre-Trial; Stipulation and Order re Exhibits to Complaint; Supplemental Pre-Trial Memorandum of Defendant; Petition for and Order Permitting appearance as Amicus Curiae; Stipulation of Facts for the Purposes of Trial; Opinion; Proposed Findings

of Fact and Conclusions of Law; Judgment for Defendant; Notice of Appeal; Two Designations of Record on Appeal and Objection of Appellants to Appellee's Designation of Additional Record on Appeal, and a full, true and correct copy of Minute Order Entered June 21, 1951, which, together with original defendant's exhibits A to I, inclusive, and copy of reporter's transcript of proceedings on February 23, 1950, November 13, 1950, and February 12, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 1st day of October, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13119. United States Court of Appeals for the Ninth Circuit. People of the State of California and Maurice C. Sparling, as Superintendent of Banks of the State of California, Appellants, vs. Coast Federal Savings and Loan Association, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed October 2, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Judicial Circuit

No. 13119

PEOPLE OF THE STATE OF CALIFORNIA,
and MAURICE C. SPARLING, as Superin-
tendent of Banks of the State of California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN AS-
SOCIATION, a Corporation,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY, AND
DESIGNATION OF RECORD

The appellants, the People of the State of California and Maurice C. Sparling, as Superintendent of Banks of the State of California, intend to rely on appeal on the following points:

1. The District Court erred in holding invalid the Banking Statutes of the State of California, which provide in effect that only legally chartered State or Federal banks can hold themselves out as banks, as applied to a privately owned federally chartered savings and loan association operating for profit in the State of California.

2. The District Court erred in holding that a privately owned federally chartered savings and

loan association, operating for profit in California, could hold itself out as a bank without being chartered as either a Federal or State bank.

3. The District Court erred in holding that a privately owned, federally chartered savings and loan association, doing business for profit in California, need not comply with State laws, which laws are not in conflict with Federal laws or regulations.

4. The District Court erred in holding that the State of California is impotent to enforce its statutes either in the State or Federal courts as to a privately owned, federally chartered savings and loan association, doing business for profit in the State of California.

5. The District Court erred in holding that the State of California may not bring an action against a privately owned, federally chartered savings and loan association, operating for profit in the State of California, for violation of a State statute without first having applied to the Federal Home Loan Bank Board for such relief.

6. The District Court erred in holding that the doctrine of exhaustion of administrative remedies applied to the State of California with reference to the violation of the banking laws of the State of California by a privately owned, federally chartered savings and loan association, doing business for profit in California.

7. The District Court erred in holding that a privately owned, federally chartered savings and loan association doing business for profit in California, is an instrumentality of the Federal Government.

8. The District Court erred in holding that a privately owned, federally chartered savings and loan association, doing business for profit in California, is exempt from complying with the State laws; and by such exemption can hold itself out as a bank, contrary to its own organization and contrary to the laws of the State of California.

9. The District Court erred in holding that the State of California does not have the inherent right to enforce its own laws as to a privately owned, federally chartered savings and loan association, doing business for profit in California, such laws not being in conflict with Federal laws or regulations.

10. The District Court erred in holding that the Home Loan Bank Board has primary jurisdiction over a privately owned, federally chartered savings and loan association, doing business for profit in California, when such association, contrary to its own organization and contrary to the laws of California, holds itself out as a bank.

11. The District Court erred in holding that the State courts have no jurisdiction to enforce the pro-

visions of the Banking Code of California as to a privately owned, federally chartered savings and loan association, doing business for profit in California, which Banking Code provides that only State or Federal chartered banks may hold themselves out as banks.

12. The District Court erred in holding that upon removal of an action from a State court to a Federal court, the Federal court must dismiss the proceeding where it is clearly shown that a privately owned, federally chartered savings and loan association, doing business for profit in California, was holding itself out as a bank, contrary to the banking laws of the State of California.

Designation of Record

That the appellants hereby designate as the record, which is material to the consideration of this appeal or review, those items numbered 1 to 14, inclusive, in the Appellants' Designation of Record on Appeal, dated August 30, 1951; which items constitute the entire official proceedings. The consideration of this appeal will not involve the six items listed in the Appellee's Designation of Additional Record on Appeal, dated September 11, 1951, and to which items the appellants herein have heretofore filed objections, on the ground that the items requested therein are not properly part of the record and are

not part of the official proceedings which have taken place herein.

Dated October 5th, 1951.

EDMUND G. BROWN,
Attorney General;

WALTER L. BOWERS
Assistant Attorney General;

/s/ BAYARD RHONE,
Deputy Attorney General,
Attorneys for Appellants.

Affidavit of Services by Mail attached.

[Endorsed]: Filed October 8, 1951.

No. 13119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C.
SPARLING, as Superintendent of Banks of the State of
California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

APPELLANTS' OPENING BRIEF.

EDMUND G. BROWN,
Attorney General,

WALTER L. BOWERS,
Assistant Attorney General,

BAYARD RHONE,
Deputy Attorney General,

217 West First Street,
Los Angeles 12, California,

*Attorneys for the Appellants, the People of the
State of California and Maurice C. Sparling,
as Superintendent of Banks of the State of
California.*

FILED

JAN 31 1952



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No. 13119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C.
SPARLING, as Superintendent of Banks of the State of
California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Preliminary Jurisdictional Statement.

This action involves the dispute between the parties as to whether a Federal savings and loan association organized for private profit and doing business in the State of California may lawfully hold itself out as a bank contrary to the laws of the State of California.

The People of the State of California and the Superintendent of Banks of the State of California filed an action in the Superior Court of the State of California in and for the County of Los Angeles to restrain the defendant and appellee from holding itself out as a bank contrary to the State Banking Code, and for penalties. [R. 9-22.] A petition for removal to the District Court,

Southern District, Central Division, was made on the basis that the suit was one arising under the Constitution and Laws of the United States involving the application of Article I, Section 8 of the Constitution, and 12 U. S. C. A., Section 1464. [R. 4, 23.] The amount in controversy exceeds three thousand dollars. [R. 7.] The notice and petition for removal were served and filed as provided in 28 U. S. C. A. 1446, and such documents, together with the bond required in said section, were duly filed. [R. 9, 23.]

The complaint alleges that the defendant and appellee, the Coast Federal Savings and Loan Association, is a savings and loan association organized under the provisions of 12 U. S. C. A. 1464, and is not authorized under either the state or federal laws to engage in or transact a banking business. At the times alleged in the complaint, the defendant and appellee held itself out and represented to the public through signs on its place of business and advertisements, that it was engaged in the banking business. Such conduct is in violation of the Bank Act of California, which provides a penalty of \$100.00 per day for each day of violation, and also provides for the issuance of an injunction to restrain such violation. Judgment was prayed for the penalty of \$100.00 per day from November 1, 1948, to the date of entry of judgment, and that the defendant and appellee be permanently restrained and enjoined from holding itself out or doing business as a bank in the particular details prayed. [R. 20-21.] There were attached to the complaint photographs showing some of the violations. [R. 57-64.]

The answer admitted that it was organized as alleged and that it had no certificate to do business as a bank, but alleges further that it did not need any such certifi-

cate and it was not subject to the jurisdiction of the plaintiffs or either of them. It did admit the truth of the photographs which had been attached to the complaint. The appellee alleged it was an instrumentality of the United States Government and that all the acts were done by the defendant by virtue of and under the authority of the Government of the United States. It also alleged that under the laws and regulations of the United States Government administrative remedies and procedures for alleged violations of law by federal savings and loan associations have not been resorted to nor exhausted by the plaintiffs and appellants. It also alleged that any and all acts, advertising and advertisements of the defendant are permitted by the laws of the United States and by the rules and regulations of the Federal Home Loan Bank Board and by the Federal Savings and Insurance Corporation. The answer prayed, in addition, that the plaintiffs take nothing by their suit, that the court decree that federal savings and loan associations are not subject to control and jurisdiction of the appellants, or either of them, and that the court decree that the Banking Code of the State of California, as applied to the defendant and appellee, is in conflict with and subject to the laws of the United States. [R. 24-38.]

Judgment was entered on August 7, 1951. [R. 136.] Within the time allowed by law, the appellants herein filed notice of appeal from such judgment [R. 136-137; Rule 73(a)], together with designation of record [R. 137-139], and statement of points upon which appellants intend to rely. [R. 236-240.]

Jurisdiction of the Court of Appeals is invoked pursuant to 28 U. S. C. A., Section 1291.

II.

Statement of the Case.

This matter was tried and submitted for decision principally upon a written stipulation of facts, with some oral and documentary evidence, and written briefs. Some time thereafter the court rendered its opinion and ordered counsel for defendant to prepare findings of fact and conclusions of law [R. 123], which was done; but the court declined to sign the findings of facts and conclusions of law submitted by defendant's counsel, and subsequently adopted its previous opinion as its findings of fact and conclusions of law and directed that judgment be entered that the plaintiff take nothing and that the case be dismissed. (Despite this fact, appellee requested that the clerk include such rejected findings and conclusions in the transcript of the record [R. 124-134].) The judgment provided further that it was without prejudice to the right of the appellants to pursue and exhaust administrative remedies. [R. 135-136.] Where the facts are sufficiently stated in the opinion, they will be taken therefrom; otherwise, from the stipulation or testimony.

The appellee was chartered by the Home Loan Bank Board under the Home Owners' Loan Act. (12 U. S. C. A. 1464(a).) It is a savings and loan association. It is not authorized by either the State of California, nor the United States to do business as a bank. [R. 107.]

The gravamen of the complaint is that through signs and other means of advertising, the appellee has transacted business in the manner of a bank and has held itself out as a bank or a savings bank, and has led the public to believe that it is such a bank, without authority, and in violation of the state statutes. The appellants further allege that the appellee, unless restrained, will con-

tinue such advertising (and indeed they have, much more flagrantly). The appellants sought injunctive relief, as well as recovery of \$100.00 a day statutory penalty. [R. 108.]

Continually, from November 1, 1948 to about March 1, 1949, the appellee made use of office signs at one of its places of business where it transacted business in the County of Los Angeles, having words as a part of said signs and used in such a juxtaposition as appear in Exhibit "A," copies of which are attached to the complaint. Some words were over-emphasized so that the sign seemed to read: "COAST FEDERAL SAVINGS BANK." [R. 94-95; see particularly pp. 59-64.] The over-emphasis in said signs of the word "bank" was called to the attention of the appellee by the appellant and by a representative of the Federal Home Loan Bank Board, and the said signs as set forth in Exhibit "A" were removed and the emphasis placed upon the word "bank" was discontinued. The signs used by the appellee thereafter recited that the appellee was a "Member of Federal Home Loan Bank" without emphasizing the word "bank." [R. 95.]

In the operation of the appellee's business it publishes a house organ which is distributed to its employees, customers and prospective customers. It is known as "Coast Federal's Challenger." It has an average circulation of over 54,000 copies. Photocopies of some of these appear in the Transcript as exhibits. [R. 101.] Particular attention is directed to the bottom of the first column on page 101, wherein it states that the appellee bought the Ninth and Hill Building several years ago as an investment, and that the Federal Reserve Bank then occupied the ground floor. "Now the Federal Reserve Bank has

consented to move to an upper floor, so Coast Federal can have the banking quarters on the main floor, basement and vault." In the issue published a year later (October, 1949) the results of a slogan contest were published, wherein a duplicate first prize was awarded for the slogan, "Our Business Is Banking. Our Banking Is Business. We solicit your banking business." [R. 96-97.] This slogan was not otherwise published in any of the literature, publicity or advertisements of appellee. [R. 98.]

On January 4, 1949, in the "Los Angeles Herald Express," there appeared an advertisement containing the words, "How to open savings account!" [R. 99.] A photostat of the entirety of said advertisement appears on page 102 of the Record. This advertisement was typical of many advertisements running at about that same time, but subsequently the picture and reference to the pass book have been discontinued. On December 27, 1948, in the "Los Angeles Times" appeared an advertisement inviting the public to the opening of Coast Federal Savings. [R. 100.] See particularly the photostat thereof appearing on page 103, wherein it refers to "COAST FEDERAL SAVINGS BANK." It is quite obvious from looking at this advertisement that it was meant to give the impression that the appellee was a savings bank, particularly with the words "COAST FEDERAL SAVINGS BANK" at the side of the advertisement, and the words "COAST FEDERAL SAVINGS" at the top and bottom of the ad.

The Superintendent of Banks of the State of California testified that he heard a radio broadcast the latter part of December, 1948, of the appellee, to the effect of urging the public to deposit their money with Coast Federal Savings and that in that broadcast reference was made

to the banking office of Coast Federal Savings at 8th and Hill. As a result of hearing such a broadcast, the Superintendent of Banks wrote to the President of the appellee, calling his attention to the radio broadcasting referring to the "banking" office. He secured a reply dated January 24, 1949, which stated in effect that they had no record of having used the term, although they had had a previous complaint from the Better Business Bureau concerning the use of the term "banking quarters" in the house organ of the previous October. Although the President stated they had no record of it, he states, "it would be possible that such term was included in padding one of our announcements to fill up the longer time of a commercial on a small station. Since there is no law against it and no misrepresentation it could have gotten by without anyone's thought." [R. 200-202.]

In its various advertising, the appellee used a part of its corporate name, viz.: "COAST FEDERAL SAVINGS." In fact, the only place in any of its advertisements where the type of business conducted by the appellee can be found is on those advertisements (since discontinued) showing an illustration of a "Savings Share Account" pass book, which pass book bears the name "Coast Federal Savings and Loan Association." At all other times and at all other places appears merely the designation, "Coast Federal Savings" without any designation that it is a savings and loan association.

In spite of the statement of the trial court concerning the removal of the signs on the window, wherein the word

“bank” was overemphasized [R. 108-109], the only evidence is that the Superintendent of Banks and the Better Business Bureau did make complaints to the Federal Home Loan Bank concerning the matter, and that the Better Business Bureau had reported to the Superintendent of Banks that although they had made such a complaint, they had not received any support on the matter. At any rate, after the complaint was made by the Superintendent of Banks to the president of the appellee, the president of the appellee informed him that he was making a change. [R. 205-206.]

In 1938 The Federal Savings and Loan Insurance Corporation published a handbook dealing with approved and recommended advertising by insured institutions, including Federal savings and loan associations. (This handbook is not a Federal Regulation.) The handbook approved the use of such phrases as “Accounts Federally Insured”, “Insured savings accounts”, “Save where savings are insured”, and, “Availability of Funds.” It stated that earnings distributed should be referred to as “dividends”, and not as “interest.” Many of the advertisements used by the appellee stated, “Earns interest from the 1st.” The trial court stated that this statement was not within the letter or the spirit of one of the regulations. [R. 109.]

At no time did the appellants request or petition the Board for a hearing or other administrative action concerning the appellee, with the exception of the informal complaints, above mentioned. [R. 109.]

III.

Pertinent State Statutes.

The particular provisions of the State law which are applicable are Sections 12 and 12a of the "Bank Act" of 1909 (Deering's General Laws, Act 652), which provisions were codified into Sections 3390, 3391, 3392, 3393, 3394 and 3395 of the Banking Code in 1949. Other existing provisions of the State law were codified in the same code in 1951, which code is now known as the Financial Code. However, neither the number nor the content of the sections were changed in 1951. These sections are as follows:

"3390. Bank or trust business not to be transacted without certificate. No person which has not received a certificate from the superintendent authorizing it to engage in the banking business shall solicit or receive deposits, issue certificates of deposit with or without provision for interest, make payments on check, or transact business in the way or manner of a commercial bank, savings bank, or trust company.

"3391. Advertisements, signs, etc., by unauthorized persons. No person which has not received a certificate from the superintendent authorizing it to engage in the banking business shall advertise that it is accepting deposits, and issuing notes or certificates therefor, or make use of any office sign, at the place where its business is transacted, having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank or trust company, that deposits are received there or

payments made on check, or any other form of banking business transacted, nor shall any such person make use of or circulate any letterheads, billheads, blank notes, blank receipts, certificates, or circulars, or any written or printed paper, whatever, having thereon any artificial or corporate name or other words indicating that such business is the business of a bank, commercial bank, savings bank, or trust company, or transact business in such a way or manner as to lead the public to believe that its business is that of a bank or trust company, except to the extent expressly authorized by this code.

“3392. Use of title indicating bank or trust company by unauthorized persons: Building and loan and savings and loan associations. No person which has not received a certificate from the superintendent authorizing it to engage in the banking business shall transact business under any name or title which contains the word ‘bank’ or ‘banker’ or ‘banking’ or ‘savings bank’ or ‘trust’ or ‘trustee’ or ‘trust company’ and which indicates that such business is the business of a bank or trust company. Any building and loan association or savings and loan association having in its corporate name words not clearly indicating the nature of its business shall state, on all signs, letterheads, and advertising matter, ‘This is a building and loan association’ or ‘This is a savings and loan association’ or words to that effect.”

“3393. Business which may be transacted by building and loan associations. Any building and loan association may issue shares and investment certifi-

cates and do such other business as may be authorized by the laws of the State relating to building and loan associations, but no building and loan association shall advertise or hold itself out to the public as a savings bank.

“3394. Savings bank business by bank which has not received certificate of authority. No bank which has not received a certificate authorizing it to engage in the savings bank business shall advertise or put forth a sign as a savings bank, or directly or indirectly solicit or receive deposits or transact business in the way or manner of a savings bank, or advertise that it is receiving or accepting savings, or do anything which might lead the public to believe that deposits are received or invested under the same conditions or in the same manner as deposits in savings banks.

“3395. Violation of article: Liability: Injunction proceedings. Any person or any bank violating any provision of the foregoing sections of this article shall be liable to the people of the State in the amount of one hundred dollars (\$100.00) a day or part thereof during which such violation continues. Any court of competent jurisdiction in a proceeding brought by the superintendent may enjoin any person from using words in violation of the provisions of this article or from transacting business in violation of this code or in such a way or manner as to lead the public to believe that its business is that of a bank, commercial bank, savings bank, or trust company.”

Section 3357 of the same code provides as follows:

“3357. Recovery of penalty, liability, or forfeiture: Disposition of fund recovered: Compromise of pecuniary penalty: Acceptance of less amount. Whenever by the terms of this code a penalty, liability, or forfeiture is imposed, such penalty, liability, or forfeiture shall be recovered in an action brought at the request of the superintendent, by the Attorney General, in the name of the people of the State, and the sum recovered shall be paid into the State Banking Fund and used in payment of claims against such fund. Any pecuniary penalty incurred by any bank or person because of violation of any provision of this code may be compromised and a less amount than that prescribed by this code may be accepted by the superintendent at any time prior to the institution of action to recover the same.”

IV.

Specification of Errors.

1. The district court erred in holding that a privately owned, federally chartered savings and loan association doing business for profit is an instrumentality of the federal government. The district court assumed and conceded that such an association was an instrumentality of the federal government and predicated its decision upon this false premise.

2. The district court erred in holding that a privately owned, federally chartered savings and loan association doing business for profit in California is exempt from

complying with the laws of the State of California; and by such exemption can hold itself out as a bank contrary to its own organization and contrary to the laws of the State of California.

3. The district court erred in holding that the sovereign State of California does not have the inherent right to enforce its own laws as to privately owned, federally chartered savings and loan associations doing business for profit in California, such laws not being in conflict with federal laws or regulations.

4. The district court erred in holding that the Home Loan Bank Board has primary jurisdiction over privately owned, federally chartered savings and loan associations doing business for profit in California, when such association, contrary to its own organization, and contrary to the laws of California, holds itself out to the public as a bank.

5. The district court erred in holding that the courts of the State of California have no jurisdiction to enforce the provisions of the banking laws of the State of California as to a privately owned, federally chartered savings and loan association, doing business for profit in California, when such banking laws provide that only State or federal chartered banks may hold themselves out as banks.

6. The district court erred in holding that upon removal of an action from a State court to a federal court, the federal court must dismiss the proceedings where

it is clearly shown that a privately owned, federally chartered savings and loan association, doing business for profit in California, was holding itself out as a bank, contrary to the banking laws of the State of California.

7. The district court erred in holding invalid the banking laws of the State of California, which laws are not contrary to any federal or state law or regulation, and which laws provide in effect that only legally chartered state or federal banks may hold themselves out as banks.

8. The district court erred in holding that a privately owned, federally chartered savings and loan association, doing business for profit in California, need not comply with the state laws of the State of California, which laws are not in conflict with federal laws or regulations.

9. The district court erred in holding that the State of California may not bring an action against a privately owned, federally chartered savings and loan association, operating for profit in the State of California for violation of a State statute, without first having applied to the Federal Home Loan Bank Board for such relief.

10. The district court erred in holding that the doctrine of exhaustion of administrative remedies applied to the State of California, with reference to a violation of the banking laws of the State of California, by a privately owned, federally chartered savings and loan association, doing business for profit in California, which association was and is holding itself out as a bank.

ARGUMENT.

A.

A Privately Owned, Federally Chartered Savings and Loan Association Doing Business for Profit in California Is Not an Instrumentality of the Federal Government.

One of the basic errors committed by the district court was its assumption that a privately owned, federally chartered savings and loan association, organized for profit, was an instrumentality of the United States. The district court in its opinion, says it is conceded that such an association is an instrumentality and agency of the United States. [R. 110.] This statement is not true, and, on the contrary, has no foundation whatever. In the footnote to the opinion [R. 122], the district court says: "The concession must be made," and then cites cases. The appellee, Coast Federal Savings and Loan Association, is a privately owned saving and loan association, which has been issued a corporate charter pursuant to the Home Owners' Loan Act. It is organized for private profit and doing business in the State of California. Indeed, the very complaint is that its business methods and methods to attract business are contrary to state law—by signs and advertising it is holding itself out as a bank or a savings bank. The appellee seeks to avoid complying with the state laws requiring it not to hold itself out as a bank by contending in this proceeding that it is a federal instrumentality. Similar contentions have been made in previous cases and the contentions have been stricken down by the United States Supreme Court beginning as early as the cases of *Thompson v. Union Pacific R. Co.*, (1870) 9 Wall. 579, 19 L. Ed. 792, *Union*

Pacific Railroad Co. v. Piniston (1873), 18 Wall. 5, 21 L. Ed. 787, wherein the Union Pacific Railroad sought to escape taxation by a state on the contention that it was a corporation created by Congress and was an agent of the general government designed to be employed and actually employed in the legitimate service of the government, both military and postal. The United States Supreme Court, however, held that it did not secure such immunity from state laws by virtue of its being incorporated by an act of Congress and acting as agent for the federal government.

The principle stated in these cases was reaffirmed many times by the United States Supreme Court. In *Metcalf & Eddy v. Mitchell*, (1926), 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, Metcalf & Eddy, a firm of consulting engineers, were professionally employed to advise states or subdivisions of states with reference to proposed water supply and sewage disposal systems. They contended that upon that basis they were exempt from payment of federal income tax. (This was for the year 1917.) The Supreme Court, with reference to the rule concerning instrumentalities of either the state or federal government, laid down the following rule (at p. 174):

“Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. Thus the employment of officers who are agents to administer its laws (*Collector v. Day*; *Dobbins v. Commissioners of Erie County*, *supra*), its obliga-

tions sold to raise public funds (*Weston v. City Council of Charleston, supra*; *Pollock v. Farmers' Loan & Trust Co., supra*), its investments of public funds in the securities of private corporations, for public purposes (*United States v. Railroad Co., supra*), surety bonds exacted by it in the exercise of its police power (*Ambrosini v. United States, supra*), are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it (*Pollock v. Farmers' Loan & Trust Co., Gillespie v. Oklahoma, supra*), and forbids an occupation tax imposed on its use (*Choctaw, O. & Gulf R. R. Co. v. Harrison, supra*). And see *Dobbins v. Commissioners of Erie County, supra*.

“When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule.”

In the case of *Clallam County v. United States*, (1923), 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328, the State of Washington sought to levy a tax on the property of the Spruce Production Corporation, which was organized by the United States as an instrumentality for carrying on the war. All of its property was conveyed to it by, or bought with money coming from, the United States and was used by it solely as a means to that end. When the war was over it stopped its work

except so far as it found it necessary to go on in order to wind up its affairs. The corporation was solely owned by the United States. Immunity from the tax was claimed under the Constitution of the United States in the case of *McCulloch v. Maryland* (1819), 4 Wheat. 316, 4 L. Ed. 579. On the other hand the state claims the right to tax on the ground that the taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds, but that taxation of the property of the agent is not taxation of the means. The court held, however, that in their opinion, when the agent was created and all the agent's property was acquired and used for the sole purpose of producing a weapon for war, that the means could not be taxed. The court stated (p. 345):

“ . . . This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. It is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States.”

In *Capital Buliding and Loan Assoc. v. Kansas Commission* (1938), 148 Kans. 446, 83 P. 2d 106, 118 A. L. R. 1212, it was contended that a building and loan association organized under Kansas law and which was a member of a federal home loan bank, was thereby a federal instrumentality and exempt from making contributions to the Unemployment Compensation Fund. The

court, however, held that a private corporation, organized for private profit, although a member of the Federal Home Loan Bank, was not a federal instrumentality and exempt from payment of the tax. The three building and loan associations involved in the litigation contended that by virtue of their stock ownership and their consequent membership in its corporate entity, they themselves became federal instrumentalities. They were aided and abetted in this position by the rules promulgated by the Internal Revenue Department to guide its revenue collectors, which provided in part that building and loan associations, savings and loan associations, cooperative banks and so forth, chartered by the various states which are members of the Federal Home Loan Bank System are instrumentalities of the United States and are exempt from payment of tax under certain sections of the Social Security Act. The court, however, pointed out that it may readily be admitted that the Federal Revenue Department is staffed with competent lawyers and that the department's opinions are entitled to respect and consideration; but those opinions are *ex parte* opinions and did not have the convincing weight of adjudications arrived at in sharply contested judicial proceedings. The court, in a carefully considered opinion, reviews both criminal and civil cases upon the subject, including those cited hereinabove.

In speaking of the definition of "federal instrumentality" the Kansas court stated:

"The term 'Federal instrumentality' is not defined in our statutes, but it is a common one in the law books. An instrumentality is anything used as a means or agency. 32 C. J. 947. Therefore a Federal instrumentality is a means or agency used

by the Federal government. In the law books, the terms 'Federal agency' and 'Federal instrumentality' are used interchangeably. Thus in 2 Cooley on Taxation (4th Ed.) 1300, it is said:

“ ‘A corporation cannot escape state taxation merely because it was created by the Federal government, nor because it was subsidized by it, nor because it is employed by the Federal government, wholly or in part, unless it is *really an agency or instrumentality for the exercise of constitutional powers* of the United States.’ ” (Emphasis added.)

In *Unemployment Compensation Commission of North Carolina v. Jefferson Standard Life Insurance Co.* (1939), 215 N. C. 479, 2 S. E. 2d 584, a similar problem arose wherein the Jefferson Standard Life Insurance Co. contended it was a federal instrumentality and exempt from unemployment taxes by virtue of the fact that it was a member of the Federal Home Loan Bank of Winston-Salem. This case cited *Capital Building and Loan Association v. Kansas*, *supra* (148 Kans. 446), *Metcalf & Eddy v. Mitchel*, *supra* (269 U. S. 514), *Clallam County v. United States*, *supra* (263 U. S. 341) and several other cases. The court held that in view of the restricted meaning which has always been given the term “federal instrumentality,” it seems doubtful whether at any time in the history of our highest court a private insurance corporation owning stock in a federal home loan bank would have been considered a “federal instrumentality”; certainly the possibility of such a determination today, in the light of the recent cases touching upon the subject, is extremely remote.

To like effect, see *In re N. Y. Joint Stock Land Bank of Rochester* (1942), 263 App. Div. 1036, 33 N. Y. Supp. 2d 434.

The case of *Federal Land Bank of St. Louis v. Priddy* (1935), 295 U. S. 229, 55 S. Ct. 705, 79 L. Ed. 1408, is cited in numerous of the cases discussed above. The case involved an attachment which had been levied against the Federal Land Bank of St. Louis and the question to be determined was whether or not the land bank was immune (as a sovereign) from judicial process. The court pointed out that it should be borne in mind that federal land banks, although federal instrumentalities, possess some of the characteristics of private business corporations and that the statute does not contemplate that their stock is to be wholly or even chiefly government owned. They have many of the characteristics of private business corporations, distinguishing them from the government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an exclusively governmental purpose. The court pointed out that the implications in the act find support also in the fact that the remedies afforded by the Federal Farm Loan Act to creditors of federal land banks are identical with those given to creditors of joint-stock land banks. Joint-stock land banks are privately owned corporations organized for profit to their stockholders through the business of making loans on farm mortgages. There is nothing in their organization and powers to suggest that they are governmental instrumentalities. In view of the character of joint-stock land banks there is no ground for supposing that Congress intended to render their property immune from seizure by judicial process and thus to make a receivership, if permitted by the Farm

Credit Administration, the sole means of compelling payment of judgments against them. The court, in a footnote, called attention by way of comparison, to the acts creating some of the various federal corporations, including the Home Owners' Loan Corporation.

In this connection it will be observed that the statute creating the Home Owners' Loan Corporation specifically provides that *such corporation* shall be an instrumentality of the United States (12 U. S. C. A., Sec. 1463(a).) However, the section which authorizes the incorporation of federal savings and loan associations (12 U. S. C. A. Sec. 1464), contains no such provision.

In *First Federal Savings and Loan Assoc. v. Johnson* (1942), 49 Cal. App. 2d 465, 122 P. 2d 83, the district court of appeal *stated* that for the purpose of the appeal it would concede that the plaintiff was an instrumentality of the federal government for the purpose of loaning its money advanced to relieve financially distressed owners of farms and homes, pursuant to the Home Owners' Loan Act of 1933. However, in the decision, the court points out that the statute (12 U. S. C. A. 1463(a)), specifically declares that the Home Owners' Loan Corporation is an instrumentality of the federal government, but the section (12 U. S. C. A. 1464) which authorized the creation of federal savings and loan associations did not state that such associations were instrumentalities of the federal government, although it was so specifically declared with reference to the Home Owners' Loan Corporation, itself. In that case, the association contended that it was exempt from taxation by the State of California by reason of the fact that it was granted a charter by the government. The court, however, specifically

held that such an association was not exempt from state taxation.

There are innumerable cases holding that certain agencies and corporations, both publicly and privately owned, are instrumentalities of the United States. Likewise, there are innumerable cases holding that private corporations, chartered pursuant to an act of Congress, are not federal instrumentalities. Many cases give lip service to the proposition that a federal savings and loan association is a federal instrumentality, but actually hold to the contrary. For example, in *State v. Minnesota Federal Savings and Loan Association* (1944), 218 Minn. 229, 15 N. W. 2d 568, 573, the Supreme Court of Minnesota said that a savings and loan association incorporated under the federal law is an instrumentality of the United States, but the effect of its decision is to the contrary. On the other hand, in *Waterbury Savings Bank v. Dana-her*, 128 Conn. 78, 20 A. 2d 455, the court said and held that a federal savings and loan association was an instrumentality of the federal government. In this case the court held that a federal savings and loan association was exempt from state taxation but that a state building and loan association that was a member of the Federal Home Loan Bank was not exempt from state taxation.

There are numerous other cases where a court labels an institution as an instrumentality of the United States or as an instrumentality of the state, or as not an instrumentality of the United States. There does not appear to be any case which sets out the principles upon which it may be determined what constitutes an instrumentality. Furthermore, the fact that the court places such a label upon an organization does not appear to have any significance in the result of the particular litigation.

That, we believe, is precisely the point in this case. The appellants believe that the appellee is not an instrumentality of the United States, but regardless of the attitude of the court on this question, the appellee nevertheless is subject to the laws of the State of California.

Some of the attributes of a corporation that is truly an instrumentality of the United States would be that its capital stock is owned by the United States, all of its employees are engaged by the United States, it has free use of the United States mail, its funds are public funds, and it is not organized for private profit. These distinctions were pointed out in *Walker v. Home Owners' Loan Corporation*, 29 Fed. Supp. 589; *Henson v. Eichorn*, 24 Fed. Supp. 42, and *United States v. Doherty*, 18 Fed. Supp. 793. In *Inland Waterways Corporation v. Hardee*, 100 F. 2d 678, it was pointed out that creation by acts of Congress granted no governmental immunity.

In *National Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701, in discussing the question of a federal instrumentality having governmental immunity, the court stated (pp. 361-362).

“But it is argued that the banks being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *McCulloch v. The State of Maryland*, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by

which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. *They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to*

be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." (Emphasis added.)

The instant case is parallel to the case of *State v. Peoples National Bank*, 75 N. H. 27, 70 Atl. 542, where the defendant, National Bank, was convicted of violating a state law in holding itself out as a savings bank. It was held that a national bank was subject to the state law providing that no person shall advertise or hold itself out as a savings bank except a savings bank incorporated in the State of New Hampshire. The purpose of the act was to prevent the obtaining of money or deposits upon a false representation that any person or organization was a savings bank subject to the laws and supervision of the State of New Hampshire.

In *Anderson National Bank v. Lockett* (1944), 321 U. S. 233, 64 S. Ct. 599, 88 L. Ed. 692, the Supreme Court held that a national bank was subject to state laws unless those laws infringed the national banking laws or imposed an undue burden upon the performance of the bank's functions. One of the questions for decision was whether the statute as applied to deposits in a national bank conflict with the national banking laws or is an unconstitutional interference by the state with the appellants' operations as a banking instrumentality of the United States. The bank contended that the State law was an unconstitutional interference with the federally authorized function of national banks as instrumentalities of the federal government. However, the court held (p. 247):

" . . . But the statute does not discriminate against national banks, *cf.* *McCulloch v. State of*

Maryland, 4 Wheat. 316, 4. L. Ed. 579, by directing payment to the state by state and national banks alike, of presumptively abandoned accounts. Nor do we find any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky statutes. Cf. *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 16 S. Ct. 502, 40 L. Ed. 700.

"This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." (Emphasis added.)

The argument presented by the appellant in the *Anderson* case is precisely the position taken by the appellee in the present case: That to require a federally chartered corporation, privately owned and doing business for profit to conform to state laws would impose upon them undue restrictions and burdens. This position is answered in the *Anderson* case.

The California statute requiring the appellee to advertise and hold itself out to the public exactly for what it is—a federal savings and loan association—and to restrain advertising or holding itself out to the public as a bank, can not by any possible interpretation be deemed any burden or interference with the federal regulations and statutes concerning the creation or operation of a federal savings and loan association. There is no conflict between the federal and the state statute on the point.

The real question here is not whether Congress may safeguard federal savings and loan associations against ordinary state legislation of a discriminatory character; but whether Congress, by the mere authorization of the

incorporation of a privately owned, federally chartered savings and loan association, has thereby prohibited the exercise of ordinary governmental powers of a state. Did Congress, by authorizing the creation of the Federal Savings and Loan Association, thereby impliedly grant such associations complete immunity from all state control?

It is fundamental, under our dual system of government, that the nation and the state are supreme and independent, each within its own sphere of action, and that each is exempt from the interference or control of the other in respect to its governmental powers, and the means employed in their exercise. Except as otherwise provided by the Constitution, the sovereignty of the state can be no more invaded by the action of the general government, than the action of the state government can be arrested or obstruct the course of the national government. (*Worcester v. Georgia*, 6 Peters. 515, 8 L. Ed. 483.)

The corporation now before this court is a privately owned, though federally chartered corporation, doing business for private profit in the State of California. It cannot be regarded as performing the functions of the government. Unless the state has forfeited its police powers and inherent right to enforce its own laws, such could only be accomplished by complete disregard of the 10th Amendment to the United States Constitution. This privately owned corporation must be held subject to the laws of the State of California.

However, without denying the power of Congress to remove a corporation organized under federal law entirely from state control, it has been recognized that in order to accomplish this end, the language relied upon would have to be expressed so clearly as to make the intention unquestionable. (*Smyth v. Ames*, 169 U. S. 466.) In *Reagan v. Mercantile Trust Company*, 154 U. S., 413, 14 S. Ct. 1060, 38 L. Ed. 1028, it was contended that a corporation organized under the laws of the United States, from that fact alone was not subject to control by the state. In refusing such a contention, the court said at page 417:

“ . . . Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State passed in 1873 in respect to it, we are of opinion that the Texas and Pacific Railway Company is, as to the business done wholly within the State, subject to the control of the State in all matters of taxation, rates, and *other police regulations*.” (Emphasis added.)

Congress, in authorizing the creation of federal savings and loan associations, has not removed such corporations from the control of the state in which it functions. The silence of Congress in this respect must be regarded as satisfactory assurance that its intention that such corporations should be subjected to police regulations exercised by the state over such business.

B.

The Doctrine of Exhaustion of Administrative Remedies Has No Application in the Present Proceeding.

The district court held there was no jurisdiction, either in the district court or in the superior court of the state by reason of the doctrine of exhaustion of administrative remedies. The district court ordered the case dismissed without prejudice, however, to the rights of the appellants to pursue administrative remedies. However, administrative remedies and the doctrine of exhaustion of administrative remedies are not involved in this proceeding in any way whatsoever—there are no administrative remedies, either provided or applicable to the present proceeding. The State of California is merely endeavoring to enforce the state laws of California and is not attempting in any way to by-pass, hinder, or impede the jurisdiction of any governmental agency.

One of the leading cases in the United States on the doctrine of exhaustion of administrative remedies, is *Myers v. Bethlehem Shipbuilding Corp.*, (1938), 303 U. S. 41, 58 S. Ct. 459, 82 L. Ed. 638. One of the leading cases in the State of California, and which follows the *Myers* case, is *Abelleira et al., v. District Court of Appeal* (1941), 17 Cal. 2d 280, 109 P. 2d 942. In the *Myers* case, the Supreme Court held as follows (p. 50):

“Third. The corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold

would, as the government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

“Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.”

In the *Abelleira* case, *supra* (17 Cal. 2d 280), the Supreme Court of California states the rule very briefly and discusses the federal cases. It states at page 292, that the doctrine of exhaustion of administrative remedies is that “where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.”

The fundamental premise of the doctrine of exhaustion of administrative remedies, is that there must be a “prescribed administrative remedy.” The doctrine is not applicable unless there is an administrative remedy provided by law (or valid regulations).

In the instant case there is no administrative remedy of any kind whatsoever provided either by the acts of Congress or by the regulations of various governmental agencies. A careful examination of the federal regulations relating to the Federal Savings and Loan System reveals that there are no administrative remedies of any kind whatsoever provided for the instant case.

The district court in attempting to justify its action lifted out of context certain provisions of Section 142.2 of Title 24 of the Code of Federal Regulations. Section 142.2 *in toto* provides:

“142.2 *Hearings*. Any person who has made an application or petition to the Board pursuant to any provision of Parts 143, 144, 145, or 146 of this subchapter may request a hearing thereon, provided such application or petition has been denied or disapproved by the Board. At any time after the filing of any such application or petition and before consideration thereof by the Board, any interested person may request a hearing upon such application or petition. The Board may order a hearing in connection with the consideration of any matter arising under any provision of the rules and regulations in this subchapter, whether or not any request therefor has been made by any person. The Board may deny any request for, or dispense with, any hearing for which this section provides when, in its judgment, no need therefor exists.”

It will be observed that the administrative hearing provided for in the regulations relate to matters under

parts 143, 144, 145 and 146. Part 143 of the regulations specifically relates to the incorporation, organization and conversion of a savings and loan association. Part 144 relates particularly to the charter and by-laws. Part 145 relates to operations, and part 146 to merger, dissolution and reorganization. It would be anticipated that if there is any regulation it would be found in part 145 relating to operations, but an examination of the numerous sections of Sections 145.1 to 145.27 reveals that there is no provision whatever which in any way comes close to the present situation. Part 145, relating to operations, relates particularly to the capital of a savings and loan association, the loans it may make and may not make, other investments, brokerage business and the sale of loans, fidelity bonds required of directors, etc., the location of its home and branch offices, etc., fiscal agents for federal instrumentalities, book value of assets, records and reports, and particularly the accounting, annual reports, monthly reports and statement of condition, examinations and audits and annual meeting of members. It contains nothing whatever concerning how a savings and loan association shall hold itself out, either as a savings and loan association, or as a bank. The only rule to be found upon this subject matter, is also found in the Act of Congress (12 U. S. C. A. 1464), that a federal savings and loan association shall include in its corporate title the words "federal savings and loan association." No word will be found anywhere whatever in the federal regulations relating to advertising or holding out by a federal savings and loan association.

Just because the federal regulations are particularly voluminous, not only as to federal savings and loan as-

sociations, but also other matters, is no reason to assume that a federal regulation covers every detail of operation from stockholders' meeting to janitorial services.

The action in the instant case is to enforce the provisions of the state laws as provided by the bringing of an injunction by the Attorney General and for penalties. It is inconceivable that a federal agency could award an injunction to restrain the continued violation of the state law and to award or enter a judgment for penalties as provided in the state statute for violation of the state law. It is conceivable, however, that the Federal Home Loan Bank could make regulations, which regulations would provide that a federal savings and loan association shall hold itself out to the public as a federal savings and loan association and shall not, by any means, hold itself out or attempt to hold itself out, either as a bank or as anything other than a federal savings and loan association. However, such regulations have not been promulgated. It is therefore respectfully submitted that the doctrine of exhaustion of administrative remedies has no application to the instant case.

The use of the doctrine of administrative remedies to the instant case is comparable to a situation where a physician and surgeon is licensed by the Board of Medical Examiners which has power to suspend or revoke the license for certain misconduct, and where it is contended in a prosecution, either in a state court for violation of the State Narcotic Act, or in federal court for violation of the Harrison Narcotic Act, or for some other

similar offense, that the prosecution of such an offense is barred by failure to bring a proceeding before the Board of Medical Examiners to suspend or revoke his license.

The Federal Food, Drug and Cosmetic Law has for years provided for a hearing before the appropriate federal department. If, at the hearing, it appears that there has been a violation of the statute, the department is required to certify the matter to the District Attorney without delay. It is established, however, that the failure to hold such a hearing does not bar a prosecution. (*United States v. Morgan* (1911), 222 U. S. 274, 32 S. Ct. 81, 56 L. Ed. 198; *United States v. Dotterweich* (1943), 320 U. S. 277, 64 S. Ct. 134, 88 L. Ed. 48.) The doctrine of exhaustion of administrative remedies was not called such by name in those proceedings, but the distinction is there just the same—there was a violation of the statute which could be enforced only in a court of competent jurisdiction. Thus, in the instant case there is a violation of a state statute which can be enforced only in a court of competent jurisdiction.

By the same specious reasoning of the trial court, every person (private or public) who has any cause of action against a federal savings and loan association, whether it be for breach of contract, eminent domain, or a cause arising from the negligent operation of a motor vehicle, would be required to pursue the claim before the Federal Home Loan Bank Board before filing suit.

C.

The District Court Erred in Holding That the State Laws Forbidding Anyone Except the Bank From Holding Themselves Out as a Bank, Is Unconstitutional.

The district court held that Congress, by its drafting of 12 U. S. C. A. 1464, had preempted the field, making invalid the state statute as to a federal savings and loan association. An analysis of the statute shows that this is not correct.

The principle of law concerning an act of Congress preempting the field, thus making any state statutes on the subject matter invalid, has been set forth recently by the United States Supreme Court in *Bethlehem Steel Co. et al. v. New York State Labor Relations Board* (1947), 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234, and *Amalgamated Association, etc. v. Wisconsin Employment Relations Board* (1951), 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 383. In the *Bethlehem Steel Co.* case, the Supreme Court stated the principle as follows (67 S. Ct. 1027, 1030-1031):

“ . . . When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U. S. 87, 46 S. Ct. 279, 70 L. Ed. 482. In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon

the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. *Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission*, 297 U. S. 471, 56 S. Ct. 536, 80 L. Ed. 810. *Welch Co. v. New Hampshire*, 306 U. S. 79, 59 S. Ct. 438, 83 L. Ed. 500. But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. *Napier v. Atlantic Coast Line R. Co.* 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432. However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, cf. *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 34 S. Ct. 829, 58 L. Ed. 1312, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation. *Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission*, *supra*; *Welch Co. v. New Hampshire*, *supra*. The states are in those cases permitted to use their police power in the interval. *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 63 S. Ct. 420, 87 L. Ed. 571. However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the

character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute. *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; compare *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U. S. 87, 46 S. Ct. 279, 70 L. Ed. 482, with *Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315; cf. *Mintz v. Baldwin*, 289 U. S. 346, 53 S. Ct. 611, 77 L. Ed. 1245.

“It is clear that the failure of the National Labor Relations Board to entertain foremen’s petitions was of the latter class. There was no administrative concession that the nature of these appellants’ business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. *Soss Manufacturing Co.*, 56 N. L. R. B. 348. It made clear that its refusal to designate foremen’s bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. *Maryland Drydock Co.*, 49 N. L. R. B. 733. We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.

“Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary con-

trol over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. Cf. Matter of Creamery Package Mfg. Co., 34 N. L. R. B. 108; Wisc. Emp. Rel. Bd. Case III, No. 348 E-117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, 'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition * * *.'"

In the *Amalgamated Association* case, *supra* (340 U. S. 383), the Supreme Court followed and referred to the *Bethlehem Steel* case and pointed out that Congress was cognizant of the policy questions before the court, and when it amended the act in 1947 it referred to the decision in the *Bethlehem Steel* case and demonstrated that it knew how to cede jurisdiction to the state. "Congress knew full well that its labor legislation pre-empts the field that the act covers insofar as commerce within the meaning of the act is concerned, and demonstrated its ability to spell out, with particularity, those areas in which it desired state regulations to be operating. The court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted, and declare invalid *state regulation which impinges on that legislation.*" (Emphasis added.)

It will be observed from an examination of the two cases quoted from above, that the cases advancing the doctrine of a congressional act pre-empting the field,

arise under the commerce clause of the Constitution, affecting either public utilities or labor legislation.

Furthermore, all of the cases are cases where the states sought to regulate the particular business. In the instant case there is no attempt by the state, either to supervise the operation or to regulate the operation of a federal savings and loan association. The state law applies to all, whether an individual, a domestic corporation, a state building and loan association, or a federal savings and loan association—that no one who does not have a certificate of authority to do business as a bank shall hold itself out as a bank. Under no stretch of the imagination can it be contended that such a statute impinges upon the act of Congress authorizing the incorporation of federal savings and loan associations.

In *Penn Dairies, Inc., et al. v. Milk Control Commission of Pennsylvania* (1943), 318 U. S. 261 63 S. Ct. 617, 87 L. Ed. 748, the validity of the State Milk Control Act as it affected a public contract for the Army was questioned. The Supreme Court held that the state law was valid. In so doing, the Supreme Court stated as follows (63 S. Ct. 617, 623-624):

“ . . . An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States v. Borden*, 308 U. S. 188, 198, 199, 60 S. Ct. 182, 188, 84 L. Ed. 181; *United States v. Jackson*, 302 U. S. 628, 631, 58 S. Ct. 390, 392, 82 L. Ed. 488; *Posadas v. National City Bank*, 296 U. S. 497, 503, 505,

56 S. Ct. 349, 352, 353, 80 L. Ed. 351, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

“Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government’s pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.”

It certainly cannot be seriously contended that if the Federal Savings and Loan Association is required to hold itself out to the public as a federal savings and loan association (and not as a bank), that the federal purpose for authorizing the creation of such associations will be frustrated. If Congress had intended these organiza-

tions to be banks, it can be assumed that Congress would have so stated. Instead, Congress specifically said they shall be known as "federal savings and loan associations." Certainly, it cannot be contended that their purpose would be frustrated if they were required to do business and represent themselves under their true name and character. There can be no possible conflict between the state statute and the act of Congress and the regulations of the Home Loan Bank Board. The Home Loan Bank Board will not be prevented in any way from carrying out its governmental function of providing for uniform operation and regulation of federal savings and loan associations throughout the United States; unless of course, it is the intention of the Home Loan Bank Board to pass a regulation to the effect that the Federal Savings and Loan Association may hold itself out as a bank. If this ever happens, then there will be a direct conflict with the regulation and the state law. Furthermore, if this ever happens, there will be a direct conflict between the regulation and the act of Congress, but that has not happened and it is not conceivable that it will happen.

If Congress had intended to pre-empt the field, we believe it would have said so in so many words. On the contrary, Congress has authorized the Home Loan Bank Board to issue charters under certain conditions to federal savings and loan associations, to supervise such associations, and to make rules and regulations relative thereto. The same act permits state building and loan associations and insurance companies to become members of the Federal Home Loan Bank. The act also permits, under certain circumstances, for a state chartered association to be converted into a federally

chartered association. Under the circumstances set out in this statute there is no indication whatever that it was the intention of Congress to pre-empt the field. This is not a field involving the commerce clause of the Constitution, nor the federal labor policy.

The position of the district court seems to be that Congress, in enacting the Home Owners' Loan Act, has pre-empted the field, and therefore, a federal savings and loan association need not comply with any provision of the state law. This is not a correct assumption. Even federal employees discharging their federal duties, are required to obey the state laws.

The principle that federal employees must obey state laws has been pointed out at great length, and the history thereof discussed in *People v. Don Carlos* (1941), 47 Cal. App. 2d 863, 117 P. 2d 748, which holds that a federal employee must obey the state laws or the particular city ordinances in the performance of his federal duties. In that case a bus driver who was hauling twelve sacks of mail on San Fernando Road, was convicted of speeding. He sought to show the time the mail was due, but the court held that regardless of the time the mail was due, he was required to obey the speed laws. See also to like effect: *Hall v. Commonwealth*, 129 Va. 738, 105 S. E. 551. It is submitted that these cases aptly illustrate that even a federal officer or employee, performing his duties is amenable to the state laws, although the state may not require from him a license or an examination.

In *Johnson v. Maryland*, 254 U. S. 51, 41 S. Ct. 16, 65 L. Ed. 126, the driver of a mail truck for the United States Post Office Department, was held to be exempt

from securing a driver's license before driving a vehicle on the state highway. That case, and the companion cases, completely illustrate the position of the appellant in this proceeding. The appellant does not contend that the appellee must secure certificate of authority, charter, permit or license in the State of California, or is under the supervision of any branch thereof. The appellant contends that the appellee must obey the laws of the State of California. In *Johnson v. Maryland* it was pointed out that the State of Maryland could not require the driver of a mail truck to secure a license from the State of Maryland before driving a mail truck on the state highways; but an employee of the United States does not secure a general immunity from the state laws while acting in the course of his employment.

The case clearly emphasizes the distinction which the appellants are endeavoring to point out. While the state cannot force the postal delivery man to obtain a license, yet, that same postal delivery man is subject to, bound by, and forced to comply with, all state and municipal ordinances and regulations in the operation of such automobile. He is bound by the state speed limit, and subject to arrest if he exceeds it. He is bound by the municipal traffic signals and subject to arrest if he violates them. The state does not need to ask the Post Office Department to enforce the state laws—the state may (and is expected to) enforce such laws itself.

The state law of California requires that no one use the word "bank" or "banking" in its name or advertisement, unless it is in fact a state or nationally chartered bank. The state law further requires that all state building and loan associations, and all federally

chartered savings and loan associations, clearly indicate in their advertising that they are building and loan or savings and loan associations. Such field has not been pre-empted by the federal government or federal regulations, and in this action the appellants are but seeking to compel the appellee to comply with the state law in such regard. The above-referred to postal employee is subject to fine if he violates traffic ordinances. The appellee herein is subject to a penalty if it has violated the state law. Clearly, the appellee has violated the state law in over-emphasizing the word "bank" in its building sign, by making its place of business appear to be "COAST FEDERAL SAVINGS BANK." This, it has done only for one purpose, to indicate to the public that it is a bank. It is uncontradicted that the appellee also referred to its place of business as "banking office" in its radio advertising.

It will also be noted that in the appellee's newspaper advertising it also emphasized the word "bank." Its newspaper advertisement of December 28, 1948, attached to the stipulated statement of facts, particularly emphasizes the word "bank"; and in no place in such advertisement does it appear that the appellee is a savings and loan association. The appellee merely refers to itself as "Coast Federal Savings" and emphasizes the word "bank." The only purpose and result of this would be to indicate that the appellee is a savings bank.

It will be further noted that the appellee even paid \$25.00 to a slogan contributor for contributing the slogan: "Our Business is Banking. Our Banking is Business. Do Your Banking Business With Us." This slogan was selected by the appellee as the most appropriate to the appellee in its business.

The appellee continuously advertised itself as "Coast Federal Savings" without using the balance of its corporate name or otherwise showing that it is a savings and loan association. The evidence shows that the Better Business Bureau of the City of Los Angeles attempted to get the appellee to correct the situation herein complained of. The mere fact, alone, that the Better Business Bureau requested the appellee to desist from such misleading advertising is proof quite in itself that at least some portion of the public found such advertising to be misleading and indicated that the appellant was doing a banking business.

The officials of the Better Business Bureau are as much a part of the public as anyone else, and even if it could be assumed that no complaints had come to the Better Business Bureau on the part of others, yet the fact remains that such advertising does indicate that the appellee is engaged in the banking business, all in violation of Section 3392 of the State Banking Code. Furthermore, the mere use of the words "bank" and "banking office" are prohibited by the state law.

Surely no one would contend that the appellee would not be subject to and have to comply with the State Usury Law. Certainly there can be no question but what the appellee corporation, in its operations within the State of California, under such law, could not charge or collect more than the legal rate of interest. There can be no question that the State Usury Law could be enforced by the state. (55 Am. Jur. 328-9.)

Conclusion.

The appellee is a federal savings and loan association, which has been issued a charter by the Home Loan Bank Board pursuant to 12 U. S. C. A. 1464. It is doing business in the State of California for private profit. In the conduct of such business, it holds itself out sometimes merely as "Coast Federal Savings" and at other times as a bank, or refers to its offices as "banking offices." On the other hand the state law specifically provides that no one, and no company, corporation or association that is not issued a certificate of authority from either the state or the federal government to conduct a bank, shall hold itself out to the public as a bank. This law also provides that the people of the State of California, and the Superintendent of Banks may bring a proceeding in a court of competent jurisdiction and secure an injunction from such continued violation and secure a judgment for penalties not to exceed \$100.00 a day for each day of violation. This action is the action specifically authorized by the state law. However, the district court has dismissed the proceedings, without prejudice however, as to the right to pursue "administrative remedies." The district court held that this federally chartered, privately-owned and operating for profit, savings and loan association is a federal instrumentality, that no proceedings can be commenced unless administrative remedies have been exhausted, and that Congress has pre-empted the field of legislation and therefore the state statutes are invalid.

The very cases which set up the establishment of the principle of law of Congress pre-empting the field, show that this case is not subject to that principle. Congress has not pre-empted the field.

The courts have given lip service in many cases that any federally chartered corporation is a federal instrumentality, but the cases show that when the term is used in this sense it has no meaning whatever. The cases hold in substance, however, that a federally chartered, privately-owned corporation is amenable to all of the laws of a state, and does not enjoy either the immunity from suit or the immunity from taxes that the federal government, itself, enjoys.

Finally, there is no administrative remedy provided either by the Act of Congress or the Regulations of the Federal Home Owners' Bank Board, and indeed there could not be any, providing for the issuance of an injunction by a court of competent jurisdiction and a judgment for penalties in the sum of not exceeding \$100.00 a day. The specific penal provisions of the state law are beyond the realm of any possible or theoretical administrative remedy. The appellants respectfully request that the judgment appealed from be reversed.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,

WALTER L. BOWERS,
Assistant Attorney General,

BAYARD RHONE,
Deputy Attorney General,

*Attorneys for the Appellants, the People of the
State of California and Maurice C. Sparling,
as Superintendent of Banks of the State of
California.*

No. 13119

**In the United States Court of Appeals
for the Ninth Circuit**

PEOPLE OF THE STATE OF CALIFORNIA AND MAURICE C.
SPARLING, AS SUPERINTENDENT OF BANKS OF THE
STATE OF CALIFORNIA, APPELLANTS,

v.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

HOLMES BALDRIDGE,
Assistant Attorney General,
WALTER S. BINNS,
United States Attorney,
JAMES R. BROWNING,
BENJAMIN FORMAN,
Attorneys,
Department of Justice.

Of Counsel:

SAMUEL D. SLADE,
HUBERT H. MARGOLIES,
Attorneys, Department of Justice.
T. WADE HARRISON,
General Counsel,
MOSE SILVERMAN,
Assistant General Counsel, Home Loan Bank Board.

FILED

FEB 27 1952

PAUL P. O'BRIEN

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In the United States Court of Appeals for the Ninth Circuit

No. 13119

PEOPLE OF THE STATE OF CALIFORNIA AND MAURICE C.
SPARLING, AS SUPERINTENDENT OF BANKS OF THE
STATE OF CALIFORNIA, APPELLANTS,

v.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,
APPELLEE.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF THE CASE

In this action, which was originally filed in the Superior Court of the State of California in and for the County of Los Angeles and was removed by the appellee to the United States District Court for the Southern District of California, Central Division, the appellants seek to enjoin the appellee from violating certain provisions of the Banking Code of California, and to recover from the appellee statutory penalties of \$100.00 a day for each alleged violation of the California law.

The facts are adequately set forth in the opinion of the District Court (R. 106-110), and in the Stipu-

lation of Facts for the Purposes of Trial (R. 93-104). In essence, they are these:

The appellee, whose principal place of business is in the County of Los Angeles, State of California, is a Federal Savings and Loan Association chartered by the Home Loan Bank Board, an agency of the United States, pursuant to the Home Owners' Loan Act of 1933, 12 U. S. C. 1464 (R. 94, 107). Under the terms of that Act, it is "subject to the jurisdiction, regulation and control" of the Home Loan Bank Board (R. 94).

The appellants concede that the fiscal operations of the appellee are, in fact, those of a savings and loan association and not those of a "bank" or "savings bank." (R. 143-144, 151). The appellants complain, however, that the appellee uses the word "bank" and "savings" and otherwise advertises so as to create the impression that the appellee is engaged in a banking business, as that term is defined in the Banking Code of the State of California (R. 12-21, 94-100, 108-109). Since the appellee has not received a certificate from the State Superintendent of Banks of California to engage in a banking business in California, and has not been authorized by the United States to transact business as a national bank (R. 94, 107), the appellants contend that the appellee has violated the Banking Code of the State of California (R. 108).¹

¹ Sections 102, 3390, 3391, 3393, and 3395 of the Banking Code of the State of California, which are set forth in the opinion below (R. 120-121), prohibit any person lacking a certificate from the State Superintendent of Banks from transacting business in the

The ultimate question thus presented for determination by this Court is whether the sanctions of the Banking Code of the State of California, which regulates the advertising activities of persons not licensed to engage in a commercial or savings bank business, may validly be invoked against a Federal Savings and Loan Association.

STATUTE AND REGULATIONS INVOLVED

The Home Owners' Loan Act of 1933 (Act of June 13, 1933, 48 Stat. 128, as amended, 12 U. S. C. 1461 *et seq.*), and the regulations issued by the Home Loan Bank Board (24 CFR 1949 ed., Ch. 1, Sub. Ch. C and D) are contained in two separate pamphlets which are submitted with this brief. The pertinent provisions of the California Banking Code are set forth in the appellants' brief at pp. 9-12.

Interest of the United States

This suit involves the attempted application of State law and regulation to a Federal Savings and Loan Association, a mutual association chartered by an agency of the United States, the Home Loan Bank Board,² pursuant to Section 5 of the Home Owners' Loan Act of 1933 (12 U. S. C. 1464). It is our position that Congress, in that Act, vested plenary authority in the Home Loan Bank Board over the entire field of

manner of a commercial or savings bank and from doing any advertising that may lead the public to believe that its business is that of a commercial or savings bank.

² The Board, an independent agency in the executive branch of the Government, was created by Section 17 of the Federal Home Loan Bank Act of July 22, 1932, 47 Stat. 725, 736, 12 U. S. C. 1437.

supervision and regulation of Federal Savings and Loan Associations to the exclusion of State law and authority.

Different regulations and varying restrictions are applied to local mutual thrift and home-financing institutions in the several States. The requirements of one State may be directly contrary to those of another State or to those which the Home Loan Bank Board deems desirable, thus subjecting Federal Savings and Loan Associations to a possible cross-fire of conflicting requirements. Some States tend to encourage, others to discourage, the mutual or cooperative type of financial institutions. This policy may be reflected in statutes and regulations affecting all operations, in day to day rulings of state supervisors, and even in the state judiciary. Compliance by Federal Savings and Loan Associations in any State with the requirements of the State authorities would make national supervision a practical impossibility. Even the imposition of penalties by the State for violation of Federal regulations would seriously hamper uniformity of operations of the Federal system. Such uniformity cannot be achieved if more than one authority has the power to determine whether there has been a violation. Nor can uniformity be obtained even in the case of an admitted violation if penalties, which should be imposed on a policy judgment basis, are imposed by more than one authority.

Accordingly, the United States is critically interested in the question whether Federal Savings and Loan Associations are to continue to be supervised exclusively by the Home Loan Bank Board. The reso-

lution of this question, we believe, has an important bearing on the financial operations of such associations and on the effectuation of the objectives of the Home Owners' Loan Act.³

SUMMARY OF ARGUMENT

A. The Home Owners' Loan Act, which authorizes the incorporation of Federal Savings and Loan Associations, is a valid exercise of the fiscal power of Congress and of the power of Congress to provide funds for the general welfare. Accordingly, Congress possesses the constitutional power to occupy the field of regulation and supervision of the operations of these associations and to exclude State law and regulation. It is well settled that State laws cannot be applied in coincidence with, as complementary to, or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction.

B. By virtue of the broad delegation of authority to the Home Loan Bank Board "to provide for the organization, incorporation, examination, operation and regulation" of Federal Savings and Loan Associations under "such rules and regulations as it may prescribe," Congress vested plenary power in the Board over the whole field of supervision and regulation of the operations of these associations. State law and regulation is, therefore, excluded because of the intention of Congress to create a national system of

³ It may well be that the California Banking Code does not, and was not intended to, apply to Federal Savings and Loan Associations. We do not argue that point; presumably it will be discussed by the appellee.

uniformly operated savings institutions supervised and controlled by a single central authority under a uniform central law.

C. The sanctions of the California Banking Code not only conflict with the national policy of uniformity of regulation and supervision of Federal Savings and Loan Associations but conflict directly with the terms of the Act and the regulations promulgated thereunder by the Home Loan Bank Board. The Act and regulations expressly authorize these associations to solicit "savings accounts." It follows, therefore, that California may not penalize an association for doing what the paramount Federal law authorizes it to do.

ARGUMENT

The Home Owners' Loan Act of 1933 vests in the Home Loan Bank Board plenary and exclusive authority over the entire field of supervision and regulation of Federal Savings and Loan Associations and excludes State supervision and regulation

A. State laws cannot validly be applied in coincidence with, as complementary to, or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction

Appellants' primary attack on the decision below is that the district court erred in holding that the appellee is a Federal instrumentality and, therefore, immune *per se* from State regulation. Appellants misconceive the import of the court's decision and the position taken by the United States as *amicus curiae*. The express holding of the court below is that "Congress has preempted the field, making invalid the State statutes plaintiffs rely upon when attempted

to be invoked against a Federal savings and loan association'' (R. 116-117).

Although we believe that Federal Savings and Loan Associations are instrumentalities of the United States,⁴ we do not contend that they are for that reason alone immune *per se* from the application of the sanctions of the California Banking Code which appellants here seek to enforce. Admittedly, all instrumentalities of the United States are not clothed with the inherent sovereign immunity of the Government merely because they are Federal instrumentalities. It is equally clear, however, that Congress "has the power to protect the instrumentalities which it has constitutionally created" and may exclude state regulation or taxation. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 102; cf. *Carson v. Roane-Anderson Co.*, 20 U. S. Law Week 4080. The question of immunity *vel non* of Federal instrumentalities depends on the intention of Congress. Where

⁴Such associations function not only as local mutual thrift institutions but in addition, serve as fiscal agents of the Government (12 U. S. C. 1464 (k)), as a means through which the Government exercises its borrowing power (12 U. S. C. 1464 (c)), and as a means through which the Government exercises its power to control the credit structure of the nation and provides funds for the general welfare (12 U. S. C. 1464 (g) and (h); 12 U. S. C. 1465). Because Federal Savings and Loan Associations perform such Federal governmental functions, they have been held to be instrumentalities of the United States. *Federal Sav. and Loan Ins. Corp. v. Kearney Trust Co.*, 151 F. 2d 720 (C. A. 8); *First Federal Sav. & Loan Ass'n v. Loomis*, 97 F. 2d 831 (C. A. 7), certiorari dismissed, 305 U. S. 666; *First Federal Sav. & Loan Ass'n v. Danaher*, 128 Conn. 78, 20 A. 2d 455; *State v. Minnesota Federal Sav. & Loan Ass'n*, 218 Minn. 229, 15 N. W. 2d 568; cf. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 392.

Congress has not expressed its purpose in so many words, "the silence of Congress as to the subjection of its instrumentalities, other than the United States [itself], to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction." *Mayo v. United States*, 319 U. S. 447-448. Accordingly, if it be assumed that Federal Savings and Loan Associations are Federal instrumentalities, our inquiry here is to ascertain that legislative intention.

In the circumstances of this case, however, we think it irrelevant whether such associations are Federal instrumentalities. Whether or not they be deemed Federal instrumentalities, it is clear that the provisions of Section 5 of the Home Owners' Loan Act, *supra*, which authorize the incorporation of Federal Savings and Loan Associations are a valid exercise of the fiscal power of Congress and of the power of Congress to provide funds for the general welfare. Cf. *Fahey v. Mallonee*, 332 U. S. 245; *First Federal Sav. & Loan Ass'n v. Loomis*, 97 F. 2d 831 (C. A. 7), certiorari dismissed, 305 U. S. 666. Accordingly, Congress possesses the constitutional power to occupy the field and to exclude State regulation of the operations and activities of those associations, and appellants so concede.

The question presented for resolution to this Court does not turn, therefore, on whether Federal Savings and Loan Associations are Federal instrumentalities but on whether Congress intended to preempt the field of regulation and supervision of such associations to the exclusion of State law.

Appellants contend that Congress has not pre-empted the field of regulation here in dispute because neither the Home Owners' Loan Act nor the regulations of the Home Loan Bank Board allegedly permit a Federal Savings and Loan Association to hold itself out to the public as a "bank" in contravention of State law. Thus, appellants assert that the State statutes here involved are valid because their terms do not conflict with the terms of Federal law and regulation.

Although, as we shall show (*infra*, pp. 19-24), there is such conflict, conflict in terms between State and Federal law is but one particularization of the fundamental inquiry: Does State action conflict with national policy? Cf. *California v. Zook*, 336 U. S. 725, 729. The factor of conflict in the terms of State and Federal statutes, or the lack of it, as a basis for determining the validity of State law is relevant only in situations where Congress has chosen to circumscribe its regulation and occupy only a limited field and the State regulation is outside that limited field. "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition." *Charleston & Western Car. R. R. Co. v. Varnville Co.*, 237 U. S. 597, 604. As the Supreme Court emphasized in *Missouri Pacific Railroad Co. v. Porter*, 273 U. S. 341, 346, State laws "cannot be applied in coincidence with, as complementary to, or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." See also *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 169;

Southern Ry Co. v. Railroad Comm. of Indiana, 236 U. S. 439, 446, 448; *Erie R. Co. v. New York*, 233 U. S. 671, 683; *Second Employers' Liability Cases*, 223 U. S. 1, 55. As we show, *infra*, pp. 10-19, the State law here sought to be invoked not only conflicts in terms but, what is more important, plainly conflicts with national policy.

B. The intention of Congress to create a national system of uniformly operated and regulated Federal Savings and Loan Associations precludes the application of State law and regulation which would impinge upon and destroy that uniformity

Federal Savings and Loan Associations are chartered pursuant to Section 5 of the Home Owners' Loan Act by the Home Loan Bank Board, which is directed to give "primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (12 U. S. C. 1464 (a).) Subject to this general policy direction and to certain statutory limitations upon the operations of the associations,⁵ the Board is vested with plenary, preemptive power "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation" of the associations (12 U. S. C. 1464 (a)).⁶ The

⁵ *E. g.*, associations are prohibited to receive creditor deposits (12 U. S. C. 1464 (b)), specific limitations are placed upon the lending operations of associations (12 U. S. C. 1464 (c)), and charters can be granted only where a necessity exists in the particular community to be served for such an association (12 U. S. C. 1464 (e)).

⁶ Appellants do not challenge the constitutionality of this delegation of authority, and no sound basis for any such challenge exists. *Fahcy v. Mallonee*, 332 U. S. 245; *First Federal Sav. & Loan Ass'n. v. Loomis*, *supra*; see *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180.

Board is further empowered to provide in its rules and regulations for the “reorganization, consolidation, merger and liquidation of such associations, * * * to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.” (12 U. S. C. 1464 (d).) Pursuant to this statutory authorization, the Board has promulgated detailed and comprehensive rules and regulations covering all phases of the operations of all Federal Savings and Loan Associations from their inception to their dissolution. See 24 CFR 1949 ed., Ch. 1, Sub. Ch. C and D.

Thus, as the court below pointed out (R. 117–118), unlike national banks as to whose operations Congress has expressly left open a field for State regulation and the application of State law, Congress has here conferred plenary and exclusive authority upon a single central agency, and that authority has been exercised. No provision was made in the Act for sharing the Board’s preemptive authority with State regulatory or supervisory agencies. *North Arlington Nat. Bank v. Kearney Federal Sav. & Loan Ass’n.*, 187 F. 2d 564 (C. A. 3); *First Federal Sav. & Loan Ass’n. v. Loomis*, 97 F. 2d 831 (C. A. 7), certiorari dismissed, 305 U. S. 666.

It is apparent, therefore, that a national system of uniformly operated savings institutions was intended by Congress. As stated by the Board in one of its Annual Reports to Congress: “In providing for the establishment of Federal savings and loan

associations in 1933, Congress contemplated that these institutions would serve two purposes: (1) to provide sound thrift and home financing facilities in communities previously lacking adequate savings and home mortgage lending resources, and (2) to develop under Federal charter a group of home financing institutions operating under the best standards and practices evolved in the long history of savings and loan associations." Ninth Annual Report of the Federal Home Loan Bank Board for the period July 1, 1940, through June 30, 1941, page 103.⁷

By virtue of the broad delegation of authority to the Home Loan Bank Board "to provide for the organization, incorporation, examination, operation and regulation" of Federal Savings and Loan Associations under "such rules and regulations as it may prescribe," Congress announced its intention that every phase of the operations of such associations from their inception to their dissolution be supervised and controlled by a single central authority under a uniform central law. And in directing the Board to give "primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States," Congress emphasized this declaration of national policy. Federal Savings and Loan Associations were not to be operated and regulated by what a particular State conceived, as expressed in its legislation, to be the "best practices." On the contrary, the Board was to select from the prevailing practices in all the States what

⁷ See also Report of the Home Loan Bank Board for the year ending December 31, 1949, p. 20.

it deemed to be the "best practices" and to prescribe, under its rules and regulations, a uniform system of operation, supervision, and regulation which would apply to all such associations in all the States.

Significantly, where Congress intended the associations to be subject to State law, Congress specifically spelled out the extent to which State law is applicable. Section 5 (h) of the Act provides that "no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home-financing institutions." (12 U. S. C. 1464 (h).) And Section 5 (i) makes provision, subject to such rules and regulations as the Board may prescribe, for the limited application of State law to the conversion of Federal Savings and Loan Associations into State-chartered institutions and to the conversion of State-chartered institutions into Federal Savings and Loan Associations (12 U. S. C. 1464 (i)).

This enumeration of the limited applicability of State law is particularly revealing when viewed in the light of the legislative history of Section 5 (i). As originally enacted, Section 5 (i) permitted a State-chartered association to convert to a Federal association by vote of its members "as provided by the law under which it operates." (48 Stat. 134.) In 1934, Congress eliminated the requirement for compliance with State law (48 Stat. 646). Since the power of Congress with respect to State-chartered

associations was concurrent rather than exclusive, the Supreme Court struck down the 1934 language of Section 5 (i) as an impingement upon the reserved powers of the States under the Tenth Amendment. *Hopkins Federal Sav. & Loan Ass'n. v. Cleary*, 296 U. S. 315. In thus invalidating Section 5 (i), however, the Court made the following illuminating observation, pointing out that Congress had "erected a standard of its own, which was to be uniform in all the States irrespective of the local laws * * * that Congress had in mind to take possession of the field to the exclusion of other occupants." *Id.* at 333. This one aspect of the legislative history of the Home Owners' Loan Act, in itself, compels the conclusion that Congress intended, insofar as constitutional limitations permit, to establish a uniform system of operation, regulation and supervision of Federal Savings and Loan Associations.

The reason for this Congressional policy is apparent. At the time of the passage of the Act, the two best known types of local mutual thrift and home-financing institutions, were building and loan associations and mutual savings banks. The institutions generally categorized as building and loan associations operated under different names in different parts of the country, being known as cooperative banks, homestead associations, savings and loan associations, and other such names. The other type of mutual savings institution, the mutual savings bank, conformed to the original pattern of a savings institution operated by a disinterested self-perpetuating board of trustees for the benefit of persons assumed to be incapable of par-

ticipating in its management but who receive the financial benefits of its mutuality. Undoubtedly, the operating structures of these local institutions varied as widely as their names; they were subject to variant requirements and controls derived from preconceptions prevalent in the particular area at the time of the enactment of the applicable State laws. In some of the States, unsafe and unsound practices had developed under haphazard regulations and supervision.⁸ And under existing State laws, thrift and home-financing facilities had not been made available to numerous communities throughout the United States. 77 Cong. Rec. 4977.

State laws were, and are, varied and conflicting. For example, California undertakes in this litigation to prevent Federal Savings and Loan Associations from conveying to the public the impression that they are "banking institutions." In New York, however, all savings and loan associations are specifically declared to be "banking organizations." New York Banking Law, § 2 (11) (McKinney's Laws of New York, vol. 4, Part 1, § 2 (11)). And, in Massachusetts, such institutions are generally designated as "banks." Ann. Laws Mass., Vol. 5A, ch. 170. But Federal Savings and Loan Associations in New York, Massachusetts and California are the same, regardless of whether the particular State calls analogous institutions "banking institutions."

Similarly, California here attempts to prohibit Fed-

⁸ Even at the present time one of the States, Maryland, has no provision for supervising and regulating its savings and loan associations.

eral Savings and Loan Associations from advertising that they receive "savings" on the ground that the authority to receive savings is reserved to "banks." By way of contrast, however, New York, in its legislation, attempts to prevent "banks" other than "savings banks or a savings and loan association" from advertising that they receive "savings." New York Banking Law, § 258-1 (McKinney's Laws of New York, Vol. 4, Part 1, § 258-1).⁹

These deficiencies and conflicts in local laws could be overcome only in a Federal system based on the best practices in all the States and administered by a central body under uniform regulation and supervision. The Home Owners' Loan Act as "Federal legislation, administered by a national agency, intended to solve a national problem on a national scale" (*National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 123) was the solution of Congress. To subject the Congressional solution of the problem to the superimposition of State regulation devised, intended and adapted for a particular form of State institution is obviously incompatible with the maintenance of a uniform Federal system, and would introduce variations as wide as the differences made by the forty-eight States in applying their theories and practices.

Even if the terms of the particular State statute did not conflict with the terms of the Home Owners' Loan Act or the regulations issued by the Home Loan

⁹ The New York statute has recently been declared invalid as applied to national banks. *People v. Franklin Nat. Bank of Franklin Square*, 105 N. Y. S. 2d 81 (Sup. Ct.).

Bank Board, the application of a diversity of State law would make national supervision a practical impossibility. Even the imposition of penalties by the State for violation of Federal regulations would seriously hamper the uniformity of operations of the Federal system. Uniformity cannot be achieved if more than one authority has the power to determine whether there has been a violation. Nor can uniformity be obtained in the case of an admitted violation if penalties are imposed by more than one authority. Cf. *Farmers' & Mechanics' Natl. Bank v. Dearing*, 91 U. S. 29.¹⁰

¹⁰ The question in the *Dearing* case was whether the sanctions of a State usury law were applicable to a national bank. Section 30 of the National Bank Act, 13 Stat. 99, 108, provided that the rate of interest chargeable by each bank was to be that allowed by the law of the State where the bank was situated, and that where no rate of interest was fixed by local law, the national bank might charge interest at a rate not exceeding 7% per annum. It further provided that "knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest * * *." A note discounted by the Farmers' Natl. Bank at the rate of interest of 10% per annum was held by the New York Court of Appeals to be illegal and to void the note, as well as the interest, under New York law. The Supreme Court reversed, stating that "The point to be sought is the intent of the law-making power. The offense of usury under this section is as great where the local law does not, as where it does, define the rate of interest. The same considerations apply in both cases. Why should Congress punish in one class of cases, and, so far as its action is concerned, exempt in the other? Why such discrimination? The result would be, that in Pennsylvania, where the contract would be void only as to the unlawful excess, the bank would lose nothing but such excess; while in New York, under a contract precisely the same, except as to the identity of the lender, the entire debt would be lost to the bank. This would be contrary to the plainest principles of reason and justice." 91 U. S. at 33.

In light of the language of the Home Owners' Loan Act and its setting, we think it clear that Congress has expressed its intention to occupy the field and to define an area of legislation demanding a uniform national rule. It has thereby excluded State regulation because the attempted application of such regulation would destroy that uniformity. As we have previously noted, *supra*, pp. 9-10, it is immaterial whether the particular State regulation would be coincidental with, supplemental to, or in opposition to the Federal enactment. "The national purpose to establish uniformity necessarily excludes State regulation." *International Shoe Co. v. Pinkus*, 278 U. S. 261, 265; cf. *Napier v. Atlantic Coast Line R. R. Co.*, 272 U. S. 605; see *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 767-768.

The observations of the Supreme Court in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, are particularly pertinent to this case. The Court there pointed out that (*id* at 773-774):

When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any State action if it is clear that Congress has intended no regulation except its own. [Citation] In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an

administrative body. In the interval before those rules are established, this Court has usually held that the police power of the State may be exercised. [Citations] But when Federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a State regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the Federal agency.

Not only does the Act embrace the entire field, the comprehensive rules and regulations adopted by the Home Loan Bank Board clearly meet the test of covering the subject matter of the statute. We submit, therefore, that Congress has preempted the field, and that the State statutes appellants rely upon cannot be applied to appellee.¹¹

C. Since the Home Owners' Loan Act and the regulations promulgated thereunder by the Home Loan Bank Board authorize Federal Savings and Loan Associations to solicit "savings accounts," the sanctions of the California Banking Code are inapplicable here

As we have just shown, the State law here sought to be invoked is invalid because it conflicts with national policy. Accordingly, even if the terms of

¹¹ Nothing in the decisions cited by appellants concerning the powers of the States with respect to national banks affects this conclusion. For the National Bank Act (12 U. S. C. 21-213) neither delegated to a Federal agency nor exercised the all-inclusive authority which the Home Owners' Loan Act grants to the Board. As the District Court stated, "As to national banks, Congress expressly left open a field for State regulation and the application of State laws; but as to Federal savings and loan associations, Congress made preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for State supervision." (R. 117-118).

the State law did not conflict with the terms of the Federal enactment, it could not be applied to the appellee. In fact, however, there is a conflict in terms.

The gravamen of the complaint is that the appellee does not have a certificate from the State Superintendent of Banking authorizing it to engage in a "banking business" but uses the words "bank" and "savings" in its advertising so as to create the impression that it is engaged in the "banking business." Specifically, appellants charge that appellee solicits "savings accounts" in its advertising and uses a shortened form of its full corporate name—"Coast Federal Savings" instead of "Coast Federal Savings and Loan Association." (R. 143-144.¹²) This form of advertising, we submit, was implicitly authorized by Congress, and is expressly authorized by the Home Loan Bank Board.

To begin with, it must be borne in mind that Federal Savings and Loan Associations are savings institutions. The Act explicitly recognizes this basic fact by providing in Section 5 (a) that they are "to be known as 'Federal Savings and Loan Associa-

¹² Appellants also complain that appellee had so arranged the signs in its window as to emphasize the word "Bank" in the phrase "Member Federal Home Loan Bank" and to make it appear from a distance that the signs read "Coast Federal Savings Bank." The signs were changed at the direction of the Home Loan Bank Board some seven months before this action was instituted, and, thereafter, the signs did not emphasize the word "Bank." (R. 100.) There is no question but that the appellee is authorized to use the word "Bank" in a proper fashion to advertise that it is a member of the Federal Home Loan Bank System. See 24 CFR 1949 ed. 123.25.

tions.' ” In thus directing that their corporate name include the word “savings,” Congress made known the nature of the institutions it was authorizing the Board to charter. It emphasized this fact in Section 6 of the Act, which is entitled “Encouragement of Saving and Home Financing.” During the Congressional debates on Section 5 of the Act, the associations were referred to as places in which people could “save their funds.” 77 Cong. Rec. 4974. And in the debates on Title IV of the National Housing Act (12 U. S. C. 1724), which is applicable to every Federal Savings and Loan Association (12 U. S. C. 1726 (a)), repeated references were made to insurance of “savings.” 78 Cong. Rec. 11192, 11196. It is also pertinent to note that both H. R. 9620 and S. 3603, the bills from which Title IV of the National Housing Act is derived, included in their preambles the stated purpose “to promote thrift and protect savings.”

In the light of this background, it can scarcely be said that Congress intended that Federal Savings and Loan Associations should not be savings institutions or should not accept savings. And it would certainly be anomalous to suggest that an account in a savings institution cannot be called a “savings account.” The fact that the savings of members of Federal Savings and Loan Associations are accumulated through payments on shares rather than through deposits plainly does not affect their essential character as savings.

In recognition of this basic fact, the rules and regulations promulgated by the Home Loan Bank Board specifically authorize the Associations to receive

“savings.” Section 141.4 defines the monetary interest of members of the association as “savings accounts,” and Section 145.1 authorizes the associations to raise their capital through payments on “savings accounts.” (24 CFR 1950 Supp. 141.4, 145.1; see also to the same effect, 24 CFR 1950 Supp. 144.1, 145.2, 145.3, 145.4, 161.4, 163.1).

Accordingly, insofar as the California statute attempts to prohibit the use of the word “savings” by Federal Savings and Loan Associations, it conflicts directly with the announced intention of Congress to create savings institutions and with the regulations issued by the Board pursuant to that policy directive. If a Federal Savings and Loan Association is authorized to receive “savings accounts,” it follows that it is authorized and has the right to advertise that fact. Plainly, the right to advertise its functions and services is necessarily incidental to the right to perform those functions and services. Cf. *People v. Franklin Nat. Bank of Franklin Square*, 105 N. Y. S. 2d 81; see 6 Fletcher, *Cyclopedia Corporation Law* (1950 ed.) § 2508.

Indeed such advertising has, in fact, been authorized. In 1938, prior to the actions of appellee which are here complained of, the Federal Savings and Loan Insurance Corporation, a Federal instrumentality which insures accounts of associations (12 U. S. C. 1724-1732) published a handbook dealing with approved and recommended advertising by insured institutions. The handbook entitled “Suggestions for Federal Savings and Loan Association in giving information to the public,” approved the use of such

phrases as "Accounts Federally Insured," "Insured Savings Accounts," "Save Where Savings Are Insured" and "Availability of Funds." (R. 109.)¹³ In this connection, the record also reveals that the Board has recognized the propriety of the use, as a matter of convenience, of the abbreviated corporate title "Coast Federal Savings" instead of "Coast Federal Savings and Loan Association" (R. 175).

In fine, the purpose of Congress in providing for the creation of Federal Savings and Loan Associations was to furnish to the public facilities for saving money. The attainment of that objective would seriously be interfered with if these associations were prohibited from informing the public of that objective and of the facilities available. We believe it can be categorically said that, if Federal Savings and Loan Associations had, from the beginning, been prevented from advertising that they receive "savings," the United States Treasury would still be the principal shareholder in these associations.¹⁴ We submit, therefore, that the California statute, as the appellants here attempt to apply it, is invalid because it

¹³ The regulations issued by the Board with respect to insured institutions (24 CFR, Ch. 1, Sub. Ch. D) automatically apply to Federal Savings and Loan Associations because of the statutory requirement that all Federal associations be insured. (12 U. S. C. 1726 (a).)

¹⁴ To provide for the financing of the associations, the Act authorized, and imposed a duty upon, the Secretary of the Treasury to subscribe for preferred shares up to the sum of \$100,000 in each association and to subscribe for any amount of fully paid income shares, provided that the total amount of preferred shares and fully paid income shares did not exceed 75 per cent of the total investment in the shares of each association. (Section 5 (g) and (j), 12 U. S. C. 1464 (g) and (j)).

conflicts with the policy of Congress and with the regulations promulgated by the Home Loan Bank Board to carry out that policy. Cf. *Missouri ex rel. Burnes Natl. Bank v. Duncan*, 265 U. S. 17; *Easton v. Iowa*, 188 U. S. 220. To uphold the statute would be to defeat the purpose for which Congress intended the chartering of appellee and other Federal Savings and Loan Associations. "That defeat could be entire were defendant obligated to suspend for lack of enough savings [accounts] with which to operate its business." *People v. Franklin Natl. Bank of Franklin Square*, 105 N. Y. S. 2d 81, 97.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

HOLMES BALDRIDGE,
Assistant Attorney General,

WALTER S. BINNS,
United States Attorney,

JAMES R. BROWNING,
BENJAMIN FORMAN,

Attorneys,
Department of Justice.

Of Counsel:

SAMUEL D. SLADE,
HUBERT H. MARGOLIES,
Attorneys, Department of Justice.

T. WADE HARRISON,
General Counsel,

MOSE SILVERMAN,
Assistant General Counsel,
Home Loan Bank Board.

No. 13119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C.
SPARLING, as Superintendent of Banks of the State
of California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

BRIEF OF AMICI CURIAE ON BEHALF OF CALIFORNIA SAVINGS & LOAN LEAGUE.

SHEPPARD, MULLIN, RICHTER
& BALTHIS and
JAMES C. SHEPPARD and
FRANK S. BALTHIS,

458 South Spring Street,
Los Angeles 13, California,

*Amici Curiae on Behalf of California
Savings and Loan League*

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PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C.
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Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

**BRIEF OF AMICI CURIAE ON BEHALF OF
CALIFORNIA SAVINGS & LOAN LEAGUE.**

I.

The Interest of California Savings & Loan League.

With the permission given by the Court, this brief is filed on behalf of California Savings & Loan League (sometimes referred to as "the League"), a group composed of over two hundred member associations, both state and federal. In this action, the Superintendent of Banks of the State of California seeks to make the State Bank Act (now a division of the California Financial Code) applicable to appellee, a federal savings and loan association. The Superintendent attempts to regulate and supervise federal savings and loan associations by determining what is proper or permissible advertising, what name or names may be used, and other matters pertaining to the internal operations of the federal association's business. (See appellant's Statement of the Case, App. Br. pp. 4-8, incl.)

The League possesses a derivative interest in this proceeding, having as its source the fact that many of its members are members of the Federal savings and loan system. Should the position asserted by the Superintendent be sustained by the Court, then

1. A federal savings and loan association doing business in California, although a member of the Federal system and under full regulation and supervision by the Federal Home Loan Bank Board, may be subjected to the additional and perhaps conflicting control by the State Superintendent of Banks in the course of the conduct of its business and internal affairs.
2. A member of the Federal savings and loan system would be subject to the control and regulation of varying types and degrees by the state in which it operates and over matters pertaining to the conduct of its internal business, even though such conduct may be permissible under federal laws and regulations applicable to such federal associations.
3. The structure of the Federal savings and loan system will be harmed because the uniformity of federal control will be thereby weakened or eliminated; and the benefits created by federal laws will be lessened and perhaps whittled away and rendered meaningless because of the regulations of one or perhaps forty-eight banking commissioners with the disturbing diversity which will result from the high Courts of the various states seeking to enforce the regulatory rulings of their respective banking commissioners.

II.

Statement of the Case.

In the interest of completeness and accuracy, several additions or corrections should be made to appellant's Statement of the Case (App. Br. pp. 4 to 8, incl.).

- (a) As an addition, it is to be noted that the Court found "No evidence was offered which would support, a finding that defendant was actually transacting its business other than strictly within the limited perimeter of its expressly authorized field." [R. 108.]
- (b) The emphasis placed upon the word "bank" was definitely discontinued by appellee about seven months before this action was commenced. [Stipulation of Facts, R. 95; Opinion and Facts filed by the Court, R. 108-109.] The statement made in Appellant's Brief in the paragraph commencing at the bottom of page 7 and continuing to page 8 seems contrary to the facts above mentioned.
- (c) The appellee's corporate name is Coast Federal Savings and Loan Association of Los Angeles. [Answer, R. 24-37; Statement of Facts, R. 93.] Section 3392 of the Financial Code of California, formerly Section 12a of the Bank Act, provides in part as follows:

"Any building and loan association or savings and loan association having in its *corporate name* words not clearly indicating the nature of its business shall state, on all signs, letter-heads, and advertising matter, 'This is a building and loan association' or 'This is a savings and loan association' or words to that effect."
(Italics added.)

Appellants' action is based upon an alleged violation of this statute but appellants have never stated or indicated what words in appellee's *corporate name* do not clearly indicate the nature of its business.

- (d) Section 3393 of said Financial Code reads as follows:

“§3393. Business which may be transacted by building and loan associations. Any building and loan association may issue shares and investment certificates and do such other business as may be authorized by the laws of the State relating to building and loan associations, but *no building and loan association shall advertise or hold itself out to the public as a savings bank.*” (Italics added.)

Appellee is not a building and loan association. (See Sec. 5057, Financial Code; discussion, *post* page 11.)

III.

Pertinent Statutes.

In addition to the statutes set forth in Appellants' Brief (pp. 9-12), the Court's attention should be called to Section 5(a) of the Home Owners Loan Act of 1933, as amended (12 U. S. C. A. 1464(a)), reading as follows:

“§1464. Federal Savings and Loan Associations—Organization authorized. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, *under such rules and regulations as it may prescribe, to provide for the organization, incorpora-*

tion, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (Italics added.)

As indicating that Congress intended a federal savings and loan association to be an instrumentality of the United States, attention is also called to Section 5(k) of the aforesaid statute (12 U. S. C. A. 1464(K)), reading as follows:

"(k) When designated for that purpose by the Secretary of the Treasury, any Federal savings and loan association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. *Any Federal savings and loan association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States."* (Italics added.)

Pursuant to the Home Owners Loan Act of 1933, as amended, the Federal Home Loan Bank Board has adopted comprehensive rules and regulations concerning the organization and operation of all federal savings and loan associations [Dist. Ct. Op., R. 111].

ARGUMENT.

A.

The Statutes Relied Upon by Appellants in Instituting This Action Are Not Applicable to Federal Savings and Loan Associations.

1. **The State Legislature Did Not Intend the California Statutes Claimed to Be Violated to Be Applicable to Federal Savings and Loan Associations.**

In this action (filed November 3, 1949), appellants alleged a violation of Sections 12 and 12(a) of the California Bank Act (Deering's General Laws, Act 652). Although clearly related and pertaining to the question as to whether the State Bank Act is applicable to Federal savings and loan associations (sometimes for brevity referred to herein as "federal associations" or "federals"), appellants have not even referred to or mentioned the State statutes dealing with building or loan associations or federal associations.

A fundamental principle of statutory construction is that a statute must be read and construed as a whole in harmony with other statutes relating to the same general subject.

In re Marquez (1935), 3 Cal. 2d 625, 628, 45 P. 2d 342;

In re Goddard (1937), 24 Cal. App. 2d 132, 139, 74 P. 2d 818.

Another rule is that statutes *in pari materia* should be construed together so as to harmonize them if possible,

to ascertain the legislative intent and maintain the integrity of both.

United States v. Stewart (1940), 311 U. S. 60, 64, 85 L. Ed. 40, 45, 61 S. Ct. 102;

Layne-Western Co. v. Buchanan County (1936) (C. C. A. 8th), 85 F. 2d 343, 347;

State of California v. Brotherhood Trainmen (Calif.) (1951), 37 A. C. 413, 423, 232 P. 2d 857;

Estate of Jacobs (1943), 61 Cal. App. 2d 152, 155, 142 P. 2d 454.

In order to determine what the State Legislature intended, it is necessary to examine such statutes dealing with building and loan associations, and also federal associations. A brief history and summary of the State legislation is as follows:

Prior to October 1, 1949, the State statutes were:

Bank Act (Deering's General Laws, Act 652; enacted Stats. 1909, p. 87, and as amended in subsequent years);

Building and Loan Association Act (Deering's General Laws, Act 986; enacted Stats. 1931, p. 483, and as amended in subsequent years);

Rights, etc. of Federal associations doing business within state (Deering's General Laws, Act 988; enacted Stats. 1939, Ch. 525).

In 1949, the Legislature adopted the State "Banking Code" which in substance codified the Bank Act. Sections 12 and 12(a) were codified as Sections 3390-3395 of the Banking Code which became effective October 1,

1949. This code was only in effect for two years, being superseded by the Financial Code.

In 1951, the Legislature repealed the Banking Code and enacted a *more comprehensive* code dealing with financial institutions. Division 1 of the Financial Code pertains to banking and is a transfer and adoption of the previous Banking Code as Division 1 of the new code. (Sections 3390-3395 of the repealed Banking Code were adopted as the same numbered sections of the new Financial Code.) Division 2 of the Financial Code deals with building and loan associations and, although this division of the code was *enacted* in 1951, it does not become effective until 1953. The foreword to Deering's Annotated Financial Code (p. v) states in part as follows:

"The Financial Code was enacted at the 1951 Regular Session of the Legislature. It consolidates and revises the law relating to the organization, regulation, and supervision of financial institutions and financial transactions, and matters incidental thereto. The entire Banking Code was repealed and incorporated in it as Division 1. The Financial Code became effective September 22, 1951, with the exception of Division 2 (embodying the Building Loan Association Act), which will become operative on the 91st day after adjournment of the 1953 Regular Session of the Legislature."

In connection with the consideration of the Financial Code which was adopted in 1951, and the entire legislative plan or scheme as shown by such code, another established rule of statutory construction is applicable and extremely helpful. This rule permits consideration of a later statute if it helps in determining the intent of the

Legislature as to previous legislation. The rule is stated in *Great Northern Railway Co. v. United States* (1941), 315 U. S. 262, 277, 86 L. Ed. 836, 844, 62 S. Ct. 529:

“It is settled that ‘subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.’ *Marchie Tiger v. Western Invest. Co.*, 221 U. S. 286, 309, 55 L. ed. 738, 747, 31 S. Ct. 578.”

In *Hubbell v. Commissioner of Internal Revenue* (C. C. A., 6th Cir., 1945), 150 F. 2d 516, 522, the Court says:

“It is true that subsequent legislation may be considered to aid in the interpretation of prior legislation upon the same subject. *Great Northern R. Co. v. United States*, 315 U. S. 262, 277, 62 S. Ct. 529, 86 L. ed. 836. *Cf. Brewster v. Gage*, 280 U. S. 327, 337, 50 S. Ct. 115, 74 L. ed. 457; *Board of County Commissioners, et al v. Seber, et al.*, 318 U. S. 705, 714, 63 S. Ct. 920, 87 L. ed. 1094; *Keasbey & Mattison Co. v. Rothensies*, 3 Cir., 133 F. 2d 894, 898.”

An analysis of all the pertinent statutes as now contained in the Financial Code, and also the predecessor statutes or acts, shows clearly that Sections 12 and 12(a) of the Bank Act (now Secs. 3390-3395, Financial Code) were not intended to apply to federal savings and loan associations.

The Legislature has dealt separately with federal savings and loan associations, and any intended regulations or restrictions by the State would logically appear in the separate act, separate part, or division of the code dealing with such federal associations. As pointed out, federal associations were formerly specifically covered by

Deering's General Laws, Act 988. In 1951, with the enactment of the Financial Code, Division 2, covering building and loan associations is divided into three parts, Part 1 covering Building and Loan Associations, Part 2, Borrowers' Mutual Building and Loan Associations, and Part 3, Federal Savings and Loan Associations. Part 3 of this Division, with a few additions, is a codification of Act 988. For example, Section 11,000, Financial Code, is a codification of Section 1, Act 988, Deering's General Laws, and reads as follows:

“§11000. *Rights, powers, and privileges available to federal associations and shareholders under laws of State.* Every federal savings and loan association incorporated under the provisions of the Home Owners' Loan Act of 1933, as now or hereafter amended, and the holders of shares or share accounts issued by any such association, respectively, have all the rights, powers, and privileges, and are entitled to the same exemptions and immunities granted, respectively, to building and loan associations organized under the laws of this State and to the holders of investment certificates, membership shares, or guarantee stock of domestic associations.”

In the entire Part 3 dealing with federal associations (and in the former statute, Act 988) there is no mention whatsoever of any restrictions or regulations as to the name, advertising or internal operations, nor is there any provision for state supervision or control by either the Building and Loan Commissioner or by the Superintendent of Banks. The complete omission of any regulation or supervision as to “federals” is significant and

indicates a clear legislative intent not to so regulate or supervise federals as to such matters.

A federal savings and loan association is specifically excluded from the definition of building and loan associations. Section 5057, Financial Code, reads as follows:

“§5057. ‘Building and loan association.’ ‘Building and loan association’ means any institution incorporated to conduct, or conducting, the business of receiving and lending money in accordance with the provisions of this part, *except federal savings and loan associations.*” (Italics added.)

Furthermore, under the previous Building and Loan Association Act (Act 986, Deering’s General Laws), it is clear that a building and loan association refers to an association incorporated under the state laws pursuant to the terms of said statute and under the regulation and control of the Building and Loan Commissioner. (See Section 1.02 defining a building and loan association, Act 986.) Section 2.02 of the Act 986 provides as follows:

“Sec. 2.02. Restrictions on Corporate Name. The Name of each domestic association hereafter incorporated shall include the words ‘building and loan association’ or ‘building-loan association’ or ‘savings and loan association’; provided, however, that no domestic association hereafter incorporated shall include the word ‘mutual’ in its name unless it shall be organized without stock, nor shall it include the word ‘guaranty’ or ‘guarantee’ in its name unless it shall be organized to issue stock.”

Throughout the Act, federals are treated separate and specifically designated as such federal savings and loan associations in distinction from domestic building and loan

associations. For example, see Section 12.11 dealing with the subject of conversion of an association “into a federal savings and loan association” and Section 12.12 dealing with the subject of conversion of “any federal savings and loan association . . . into a building and loan association under the laws of this State.”

It is demonstrable from the above that both under the present Financial Code and under the former Building and Loan Association Act a “building and loan association” does not include a federal association. With this in mind, let us read Section 3393, Financial Code, which provides as follows:

“Sec. 3393. Business which may be transacted by building and loan associations. *Any building and loan association* may issue shares and investment certificates and do such other business as may be authorized by the laws of the State relating to building and loan associations, *but no building and loan association* shall advertise or hold itself out to the public as a savings bank.” (Italics added.)

Appellants claim that this section (formerly Sec. 12(a), Bank Act), was violated by appellee, a federal association. [Complaint, Counts One to Five, R. 11-19.] In fact, the whole tenor of appellants’ brief is that appellee (a federal association) is guilty of holding itself out as a savings bank in violation of said Statute. (See the first paragraph of Appellants’ Brief, p. 1.) However, Section 3393 by its very terms clearly applies only to building and loan associations and appellee is a federal savings and loan association, specifically excluded from the definition of a building and loan association by Section 5057, Financial Code.

If there were any statute regulation or supervision over federal savings and loan associations, it could only logically be by the Building and Loan Commissioner, not by the State Superintendent of Banks. The former Building and Loan Association Act (Act 986) provides for the establishment of the office of Building and Loan Commissioner. (See Section 1301, *et seq.*, for creation of office and general powers of regulation.) The successor statute, Section 5250, Financial Code, provides for the powers of the Building and Loan Commissioner as follows:

“§5250. Powers of commissioner. The commissioner is charged with the administration and enforcement of this division, and of all other laws relating to or affecting the incorporation, organization, business, operation, merger, consolidation, dissolution, or liquidation of associations subject to the provisions of this division. The commissioner has and may exercise all of the powers necessary or convenient for such purpose.”

It will be noted that this section provides that the commissioner is the administrator of *all laws* relating to any association “subject to the provisions of this division.” “Federals” are covered by Part 3 of said division. It is believed that the above establishes the legislative intent to place the matter of any purported or attempted regulation or supervision affecting federal savings and loan associations under the jurisdiction of the Building and Loan Commissioner which would, of course, eliminate the applicability of any sections of Division 1 (Banking) of the Financial Code or any regulation or control by the said Superintendent of Banks.

2. **The State Statutes Relied Upon by Appellants Are Not Applicable to Federal Associations Because, if Construed as Applicable, They Are in Conflict With Federal Law and Therefore Invalid.**

We have argued above that the State Legislature did not intend Sections 12 and 12(a) of the Bank Act (and the successor statutes Sections 3390-95, Financial Code) to be applicable to federal associations. This position is further fortified by the fact that any other conclusion, that is, that such statutes are applicable to federal associations, would thereby put them in conflict with federal law and make them invalid.

It is a well established rule of statutory construction that if there are two possible constructions, one which would uphold the statute and the other which would make it invalid or unconstitutional, then the construction avoiding invalidity or any doubt of constitutionality will be taken. Thus in *Screws v. United States* (1944), 325 U. S. 91, 98, 89 L. Ed. 1495, 1500, 65 S. Ct. 1031, 162 A. L. R. 1330, the rule is stated:

“This Court has consistently favored that interpretation of legislation which supports its constitutionality.”

In *National Labor Relations Board v. Jones & McLaughlin Steel Corp.* (1936), 301 U. S. 1, 30, 81 L. Ed. 893, 908, 57 S. Ct. 615, 108 A. L. R. 1352, the Court said:

“We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same.”

The rule is also stated in *Linder v. United States* (1925), 268 U. S. 5, 17-18, 69 L. Ed. 819, 823, 45 S. Ct. 446:

“In the light of these principles and not forgetting the familiar rule, that ‘a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score,’ the provisions of this statute must be interpreted and applied.”

In the California case of *Miller v. Municipal Court* (1943), 22 Cal. 2d 818, 828, 142 P. 2d 297, the rule is set forth:

“If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.”

Henry v. Raboin (1946), 395 Ill. 118, 69 N. E. 2d 491, 169 A. L. R. 927, presents a situation somewhat similar to the instant case. In that case, the question was whether a provision of the state constitution providing for double liability on shareholders of banks applied only to shareholders in state banks or also to shareholders in national banks. The section of the constitution did not by express language limit its application to the stock-

holders of state banks and conversely it was not worded so as to expressly include stockholders of national banks. If the state law applied to shareholders in a national bank, it would thereby be invalid. The Illinois Supreme Court applied the rule of statutory construction by accepting the interpretation which would uphold the validity of the state constitutional provision and by eliminating the construction which would make said state law unconstitutional. The Court states the rule as applied to these facts as follows:

“There is a rule of statutory construction which has been applied to this constitutional provision. It is that where a statute comprehends within its general terms two or more subjects or classes, some of which are within the jurisdiction of the legislative power of the State and some of which are outside its authority, the courts, to sustain the law as to the class to which it should have been restricted, will exclude from the operation of the statute the subjects or classes over which the State had no legislative jurisdiction.”

In the instant case, it will be argued in Point C (*post*, pages 21 to 25), there is at least grave doubt regarding the validity of making the provisions of the State Bank Act applicable to federal savings and loan associations. In view of the strong and sound rule of statutory construction set forth above, it is submitted that the state statutes are not applicable, and were not intended to be applicable, to federal associations.

B.

Even Assuming the Said Banking Statutes Are Applicable to Federal Associations, the Acts Complained of Here Are Not Sufficient to Establish Any Violation by Appellee.

It appears to the League that the acts complained of in this action consist principally of small matters upon which the State Superintendent of Banks has attempted to build a case. We assume for the purposes of this particular argument that the State banking statutes involved here are applicable to "federals" but we, of course, do not concede this.

As will be shown, all of these matters complained of, if they have any merit whatsoever, should properly be taken before the Federal Home Loan Bank Board, which by Federal law and administrative regulations has full and complete jurisdiction.

For example, the gravamen of Count One of the Complaint as contained in paragraph IV thereof [R. 12], is that appellee in its office signs at its place of business over-emphasized the word "bank" as used in the phrase "Member Federal Home Loan Bank" [Stipulation of Facts, R. 94, 95]. This practice was discontinued about seven months before the action was instituted [Opinion, R. 108]; there were no complaints after the change was made, as shown by Mr. Sparling's testimony:

"Q. And you heard no complaints—rather, you know of no other instances between December, 1948, and November, 1949, where the word 'bank' was emphasized in its name on the building, or used in radio or other advertising? A. No, sir, not after the change was made, and I think it was

made—I don't know the date, but I imagine probably along in January or February of '49, and after that I did not hear any such complaint, no, sir.”
[R. 206.]

The most significant thing about this incident is that after the matter was called to the attention of the Federal Home Loan Bank Board (in whose jurisdiction it would properly lie), it was immediately corrected [Stipulation of Facts, R. 95], and there were no further *complaints*. This in our opinion indicates quite clearly the legal and practical solution to any such complaints as to signs or advertising by a federal association—the matter should be taken up with the Federal Home Loan Bank Board, the administrative agency which regulates and supervises such associations.

As to the acts complained of in paragraph IV of Count Two [Complaint, R. 14], and as shown by the Stipulation of Facts [R. 95-98], these all consist of matters published in appellee's *house organ* “Coast Federal's Challenger.” The excerpts from this circular distributed to *employees* and customers, refer to appellee as “Coast Federal.” Is there anything more natural than the use of this abbreviation when speaking to employees and customers? The house organ also refers to “savings” and to “savings accounts.” These terms have been approved for advertising uses by the Federal Savings and Loan Insurance Corporation [Opinion, Facts, R. 109]. The use of the phrase “Earns interest from the 1st” undoubtedly is questionable [R. 96; Opinion, R. 109]; however, considering the fact that this appeared in a house organ, it would seem to be of a somewhat minor nature and, if for any reason it should be considered serious, is

something to be called to the attention of the Home Loan Bank Board.

As to the slogan contest conducted in the house organ and the selection of one referring to "banking business" [R. 96-97], we feel that such material is of inconsequential significance and in no sense does the same constitute substantially, or otherwise, "a holding out as a bank." This particular slogan contest matter seems to be the gravamen of Count Three [R. 16-17].

With regard to the general use of the term "Coast Federal Savings" in advertising the institution, and which is complained of in Count Four [R. 17-18], we believe that the use of such name "Coast Federal Savings" is perfectly proper and is justified by all business practices, by common sense and everyday usage. The mere assertion of the position taken by appellants that in every use of its name whether for formal purposes or for advertising or in an employees' publication, or otherwise, the institution must refer to itself as "Coast Federal Saving and Loan Association of Los Angeles" (its full corporate name) indicates that such argument borders on the absurd.

Furthermore, there is no violation of the State statute involved even if the same is applicable to federal associations. The pertinent part of the State statute (Sec. 3392, Financial Code) reads:

"Any building and loan association or savings and loan association having in its corporate name words not clearly indicating the nature of its business shall state, on all signs, letterheads, and advertising matter, 'This is a building and loan association' or 'This is a savings and loan association' or words to that effect."

We believe it obvious that appellee, Coast Federal Savings and Loan Association of Los Angeles, does not have "in its corporate name words not clearly indicating the nature of its business." We, therefore, assert that there is no violation of this statute whatsoever and the use of the term "Coast Federal Savings" is entirely beside the point and not even affected by this statute. We further assert that such abbreviation of its name, particularly in advertising, is just as natural and lacking in deception as any of the following: the use of Bank of America for Bank of America National Trust and Savings Association; the use of Security Bank for Security-First National Bank of Los Angeles; the use of Superintendent for Superintendent of Banks of the State of California; the use of Supreme Court for Supreme Court of the United States.

We call the Court's attention again to the actual wording of Section 3393, Financial Code (formerly Sec. 3393, Banking Act) which by its wording applies only to building and loan associations, as follows:

"§3393. Business which may be transacted by building and loan associations. Any building and loan association may issue shares and investment certificates and to such other business as may be authorized by the laws of the State relating to building and loan associations, but no building and loan association shall advertise or hold itself out to the public as a savings bank."

Appellee is not a building and loan association (Sec. 5057, Financial Code) and, therefore, it cannot in any sense be established that appellee, a federal association, violated such statute.

When the statutes are carefully read and the acts of appellee analyzed the conclusion follows that even if the statutes are applicable to federal associations there were no violations of such statutes by appellee.

C.

The Federal Government Exercises Full, Complete and Exclusive Jurisdiction Over Federal Savings and Loan Associations and Having Occupied This Field Any Attempted State Regulation or Supervision Is Invalid.

The Federal statute (Sec. 5, Home Owners' Loan Act of 1933, as amended, 12 U. S. C. A., Sec. 1464) provides for the organization, incorporation, examination, operation and regulation, under rules and regulations of the Home Loan Bank Board, of associations to be known as "Federal Savings and Loan Associations." The statutory purposes of federal savings and loan associations are "to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes." Under this full grant, the power of the Board is plenary. Federal savings and loan associations are instrumentalities of the United States.

Federal Savings & Loan Ins. Corp. v. Kearney Trust Co. (1945), 151 F. 2d 720 (C. A. 8);

Waterbury Savings Bank v. Danaher, 128 Conn. 78, 20 A. 2d 455;

State v. Minnesota Federal Savings & Loan Assn., 218 Minn. 229, 15 N. W. 2d 568.

We will concede at the outset that there are certain state or local laws applicable to federal associations. These are laws not regulatory of savings institutions as such,

but generally applicable to the public. If appellee owns real estate, it is subject to the laws of California with reference to real property taxation. If it seeks redress through the medium of a State court it must obviously comply with the adjective laws of procedure of the State courts.

The line to be drawn is that as applied to a federal instrumentality, the State law cannot regulate its internal organization, its business conduct or affect or be restrictive as to the federal purposes for which the instrumentality was created.

Examples of local laws which have been held to be applicable to corporations or organizations claiming federal protection are cited and stressed in appellant's brief but we believe that all of these cases are immaterial and not in point. For example, appellant relies upon the case of *Capital Building and Loan Assoc. v. Kansas Commission* (1938), 148 Kans. 446, 83 P. 2d 106, which held that a state building and loan association which was also a member of the Federal Home Loan Bank was not exempt from paying taxes under the state Unemployment Compensation law. We concede the correctness of this holding.

All of these cases properly hold local laws are applicable because they do not affect or regulate the federal instrumentality or organization in the conduct of its business or internal organization or with reference to carrying out the federal purposes for which organized.

But let us examine the regulation and supervision attempted in the instant case. The State Superintendent of Banks asserts authority

- (a) To determine what is the proper name appellee may use, "Coast Federal Savings and Loan Association" or "Coast Federal Savings" or "Coast Federal."
- (b) To determine what is proper advertising and whether such terms as "savings" or "savings account" (approved by the Federal Savings and Loan Insurance Corporation) may be used.
- (c) To determine generally whether the prohibition against "holding out as a savings bank" which by State law is applicable to building and loan associations also applies to "federals."

We submit that as to any federal association all of the above, the name used, the terms used in its business and advertising, and its business conduct generally are matters vitally affecting its operation as a savings institution and clearly related to the *federal purposes* for which said associations were created. They are matters for the Home Loan Bank Board to decide while, according to Federal statute, "giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." For example, it is obvious that any restriction on the right to use the word "savings" would have had a serious effect upon the growth and development of federal associations. It is doubtful if such associations could not have freely used the word "savings," federal associations could have survived.

Our position, which we believe is sustained by the authorities, is that in the conduct of its business authorized by the laws of the United States, a federal savings and loan association is not subject to any regulatory power of the State Superintendent of Banks.

The Federal statute, and the regulations adopted thereunder, make no provision whatsoever for sharing authority or responsibility as to federal savings and loan associations with the State government. A leading case establishing that federal power is supreme and exclusive where Congress has passed legislation covering the field is *Bethlehem Steel Company v. New York Labor Relations Board* (1946), 330 U. S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026. In that case, the Court determined that:

“When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own.”

And that:

“But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency.”

In *First National Bank v. California* (1923), 262 U. S. 366, 67 L. Ed. 1030, 43 S. Ct. 602, the Supreme Court held that a state law providing for the escheat of deposits of a solvent national bank was invalid, saying:

“These banks are instrumentalities of the Federal government. Their contracts and dealings are subject to the operation of general and indiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation. But any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created.”

See also:

Davis v. Elmira Savings Bank (1896), 161 U. S. 275, 283, 288, 290, 40 L. Ed. 700, 16 S. Ct. 502;

First Federal Savings and Loan Association of Wisconsin v. Finnegan (1937), 19 Fed. Supp. 678, affirmed 97 F. 2d 831, 121 A. L. R. 99;

First Federal Savings and Loan Association of Meriden v. Danaher, Commissioner (1940), 128 Conn. 78, 20 A. 2d 455, 464.

Conclusion.

The California Savings and Loan League is interested in a sound system of regulation and supervision for federal savings and loan associations. To be effective and to carry out the federal purposes implicit in the Federal law, the system must be uniform throughout the country with no divided responsibilities as between the Federal

Home Loan Bank Board and the numerous bank superintendents and building and loan commissioners. Certainly, there can be no logical or efficient supervision over important internal and business affairs such as use of names or advertising when state banking officials all over the country attempt to enter this field of regulation concerning federal associations.

Because

- (a) The State Legislature did not intend the State statutes dealing with banking to apply to federal savings and loan associations,
- (b) Even assuming applicability, the acts of appellee did not constitute violations of such State banking laws, and
- (c) The federal government, having covered the field by legislation and regulation as to federal associations, has complete and exclusive jurisdiction and any attempted State regulation is therefore invalid,

the conclusion follows that the decision of the District Court should be affirmed.

As *amici curiae*, we respectfully request affirmance of the judgment below.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER
& BALTHIS and

JAMES C. SHEPPARD and
FRANK S. BALTHIS,

*Amici Curiae on Behalf of California
Savings and Loan League.*

No. 13119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C.
SPARLING, as Superintendent of Banks of the State of
California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.
Central Division

BRIEF FOR APPELLEE.

FILED

MAR 25 1952

FRANK P. DOHERTY,
CRAIL & CRAIL,
JOE CRAIL,
WILLIAM F. MCKENNA,
JAMES T. BRADSHAW, JR.,

PAUL P. O'BRIEN, 315 West Ninth Street,
CLERK Los Angeles 15, California,

*Attorneys for Appellee, Coast Federal Savings
and Loan Association of Los Angeles.*



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No. 13119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C.
SPARLING, as Superintendent of Banks of the State of
California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

**On Appeal From the United States District Court for the
Southern District of California.
Central Division**

BRIEF FOR APPELLEE.

Opinion of the District Court.

The opinion of the District Court appears at R. 105
and is reported in 98 Fed. Supp. 311.

Jurisdictional Statement.

This action involves an interpretation of 12 U. S. C.
1464 and other statutes relating to Federal savings and
loan associations. Because the Plaintiffs contend that
state statutes imposing operational requirements in con-
flict with those imposed by Federal law and regulations
are constitutionally applicable to Federal savings and loan

associations, this action also involves Article I, Section 8 of the Constitution of the United States. It was removed from the State Courts to the United States District Court. This Court has jurisdiction of the appeal pursuant to 28 U. S. C. 1291.

Statement of the Case.

The testimony, and Stipulation of Facts, which Appellee "Coast Federal Savings and Loan Association of Los Angeles" views differently than do the Appellants in their Statement of the Case (Op. Br. p. 4), are discussed in full in the Argument, *infra*, Part II, B, beginning at page 23. In general, the Complaint charges the Appellee Coast Federal with transgressing former Sections 12 and 12a, Act 652, Deering's Cal. Gen. Laws (and the codification of those sections effective less than three weeks before the filing of the Complaint) in two general ways, (1) in that Coast Federal allegedly "solicited and received deposits and transacted business in the way and manner of a bank and savings bank" [R. 16] and (2) in Coast Federal's advertising. The Answer [R. 24] denies the allegations of the Complaint except as to the use of certain phrases and signs, discussed in detail, *infra*.

After trial, the District Court rendered final judgment in favor of the Defendant-Appellee Coast Federal Savings and Loan Association of Los Angeles.

While the Appellee views the facts differently than the Appellants, Appellee must object that the Appellants' Statement of the Case makes assertions that do not even purport to be substantiated in the record. By way of example is the Appellants' unwarranted parenthetical insertion, completely without record substantiation, regarding Coast Federal's advertising, Opening Brief, page 5, first

line. Other statements completely without record basis appear at several places in Appellants' Statement of the Case. These statements are not only without basis in the record, they are not in accord with the facts.

Statutes Herein Involved.

Codification of Sections 12 and 12a, Act 652, Deering's Gen. Laws, in the Banking Code was effective three weeks before this action was filed. The Appellants' Brief (Op. Br. p. 9) sets out the statute after codification. Sections 12 and 12a, and related Sections 1.02, 12.01 and 12.03, of Act 986, Deering's Gen. Laws, are here set out for the convenience of the Court.

Act 652, Deering's Gen. Laws:

"Sec. 12: *Unauthorized pretensions of doing banking business forbidden: Use of word 'bank,' 'trustee,' etc.: Application of rule to building and loan associations: Penalty for violations: Injunction.* No person, firm, company, co-partnership or corporation, either domestic or foreign, not subject to the supervision of the superintendent of banks, and not required, by the provisions of this act, to report to him, and which has not received a certificate to do a banking business from the superintendent of banks, shall advertise that he or it is receiving or accepting money or savings, and issuing notes or certificates of deposit therefor, or shall make use of any office sign, at the place where such business is transacted, having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank or trust company, that deposits are received there or payments made on check, or any other form of banking business transacted, nor shall any such person or persons, firm, company, co-partnership or corporation, domestic or foreign, make

use of or circulate any letter-heads, billheads, blank notes, blank receipts, certificates or circulars, or any written or printed, or partly written and partly printed, paper, whatever, having thereon any artificial or corporate name or other word or words indicating that such business is the business of a bank, savings bank or trust company; nor shall any such person, firm, company, copartnership or corporation, or any agent of a foreign corporation not having an established place of business in this state, solicit or receive deposits or transact business in the way or manner of a bank, savings bank or trust company, or in such a way or manner as to lead the public to believe that its business is that of a bank, savings bank or trust company.

“Use of words ‘bank,’ ‘trust,’ etc.: Application of rule to building and loan associations. Nor shall any person, firm, company, copartnership or corporation, domestic or foreign, not subject to the supervision of the superintendent of banks, and not required by the provisions of this act to report to him, and which has not received from the superintendent of banks a certificate to do a banking business, hereafter transact business under any name or title which contains the word ‘bank’ or ‘banker’ or ‘banking’ or ‘savings bank’ or ‘savings’ or ‘trust’ or ‘trustee’ or ‘trust company,’ and which indicates that such business is the business of a bank or trust company; provided, that this section shall not apply to the corporate name of any building and loan association now or heretofore doing business in this state; provided, that any building and loan association having in its corporate name words not clearly indicating the nature of its business shall, on all signs, letterheads and advertising matter, state ‘This is a building and loan association’ or words to that effect; and provided, further, that any build-

ing and loan association may borrow money, issue investment certificates or evidences of indebtedness, stating the rate of interest and terms and conditions of repayment, and do such other business as may be authorized by the laws of the state relating to building and loan associations; and provided, further, that no such association shall advertise or hold itself out to the public as a savings bank.

“Penalty for violations: Injunction. Any person, firm, company, copartnership or corporation, domestic or foreign, violating any provision of this section shall forfeit to the state one hundred dollars a day for every day or part thereof during which such violation continues. Upon action brought by the superintendent of banks the court may issue an injunction restraining any such person, firm, company, copartnership or corporation from further using such words in violation of the provisions of this section or from further transacting business in such a way or manner as to lead the public to believe that its business is that of a bank, savings bank or trust company during the pendency of such action and for all time and may make such other order or decree as equity and justice may require.”

“Sec. 12a: Prerequisites to advertising as bank: Forfeiture for violation of statute: Restraining violations: Manner of transacting business: Application of rule to building and loan associations. Every person, firm, company, co-partnership or corporation, domestic or foreign, advertising that he or it is receiving or accepting money or savings, and issuing notes or certificates of deposit therefor or advertising that he or it is transacting the business of a bank, savings bank or trust company, or making use of any office sign at the place where such business is transacted, having thereon any artificial or corporate

name, or other words indicating that such place or office is the place or office of a bank or trust company, or that deposits are received there or payments made on check(s), or that interest is paid on deposits, or that certificates of deposit, either with or without interest are being issued, or that any other form of banking is transacted, and every person, firm, company, copartnership or corporation, domestic or foreign, making use of or circulating any letter-heads, bill-heads, blank notes, blank receipts, certificates or circulars, or any written or printed, or partly written and partly printed, paper, whatever, having thereon any artificial or corporate name, or advertising that such business is the business of a bank, savings bank or trust company, must have the proper capital stock paid in and set aside for the purpose of transacting such business, and must have received from the superintendent of banks, as provided for in this act, a certificate to do a banking business.

"Forfeiture for violation of statute. Any person, firm, company, copartnership or corporation, domestic or foreign, violating any provision of this section shall forfeit to the state one hundred dollars a day for every day or part thereof during which such violation continues.

"Restraining violations. Upon action brought by the superintendent of banks the court may issue an injunction restraining any such person, firm, company, copartnership or corporation from further violating any provision of this section, and may make such further order or decree as equity and justice may require.

"Manner of transacting business. Every person, firm, company, copartnership or corporation doing any of the things or transacting any of the business

defined in this section, must transact such business according to the provisions of the bank act, and the superintendent of banks or his deputy or examiners shall have authority to examine the accounts, books and papers of every such person, firm, company, copartnership or corporation, domestic or foreign, in order to ascertain whether such person, firm, company, copartnership or corporation has violated or is violating any provisions of this section;

“Application of rule to building and loan associations. Provided, that this section shall not apply to the corporate name of any building and loan association now or heretofore doing business in this state; and provided, further, that any such association having in its corporate name words not clearly indicating the nature of its business shall, on all signs, letter-heads and advertising matter, state: ‘This is a building and loan association’ or words to that effect; and provided, further, that any building and loan association may borrow money, issue investment certificates or evidences of indebtedness, stating the rate of interest and terms and conditions of repayment, and do such other business as may be authorized by the laws of the state relating to building and loan associations; and provided, further, that no such associations shall advertise or hold itself out to the public as a savings bank.”

Act 986, Deering’s Cal. Gen. Laws:

“Sec. 1.02. *Building and loan association.* The term ‘building and loan association’ is hereby defined to mean any incorporated institution which shall have been incorporated to conduct, or shall be engaged in conducting, the business of receiving and lending money in accordance with the provisions of this act or shall have heretofore been incorporated to conduct

the business of receiving and lending money in accordance with the provisions of any act or acts, or part or parts of any act or acts, of which this act is a continuation or amendment.”

“Sec. 12.01. *Restriction on Building and Loan Business.* No person, firm, co-partnership, association, company or society, either domestic or foreign, except a corporation, shall conduct or carry on in this State the business of accumulating the savings of its shareholders, stockholders, members or investors, and of loaning such accumulations in the manner of building and loan associations; and no corporation shall conduct or carry on such business except in accordance with the provisions of this act. This act shall not apply to investment companies except in the case of investment companies which shall also be building and loan associations as defined in section 1.02 of this act.”

“Sec. 12.03. *Restrictions on name ‘building and loan.’* No person, firm, co-partnership, association, company, society or corporation, either domestic or foreign, unless the lawful holder of a license to transact business in this state issued by the commissioner and then in force, nor unless actually engaged in carrying on a building and loan business in this state, shall hereafter transact business in this state under any name or title which contains the term ‘building and loan’ or ‘building-loan’ nor use any sign or circulate or use any letter-head, billhead, circular or paper whatever or cause to be published any advertisement which indicates that his or its business is the character or kind of business carried on or transacted by an association, or which is calculated to lead the public to believe that his or its business is that of an association. Any violation of any of the provisions of this section shall constitute a misdemeanor

or (*sic*) punishable by a fine of not exceeding five hundred dollars or by imprisonment in the county jail for not exceeding ninety days or by both such fine and imprisonment. Upon action brought by the commissioner, any court of competent jurisdiction may issue an injunction restraining any person, firm, copartnership, association, company, society or corporation from continuing to violate any provision of this section."

Summary of Argument.

I.

The judgment below for the Defendant should be affirmed because Section 12 and Section 12a, Act 652, Deering's Cal. Gen. Laws, on which the Complaint is rested, never were intended by the California Legislature to apply to Federal credit activities.

Sections 12 and 12a by their terms apply only to such corporations as are "domestic or foreign." Federal savings and loan associations are neither domestic nor foreign, but federal, or national. Accordingly, 12 and 12a are not intended to apply to Federal savings and loan associations.

There is no more reason to apply Sections 12 and 12a (enacted in 1909 and 1911, respectively) to Federal savings and loan associations, first authorized in 1933, than to Federal Reserve Banks, Federal Home Loan Banks, or Federal Land Banks, for example. So applied, Sections 12 and 12a would prevent these Federal institutions even now from publicly displaying their own corporate names. The sections would prevent these institutions, and others such as the Reconstruction Finance Corporation, as well as Federal savings and loan associations, from performing their proper functions in California.

To apply Sections 12 and 12a to these Federal corporations, including Federal savings and loan associations, would be both unreasonable and in direct conflict with California's consistent legislative, administrative and judicial policy over many years, as well as with statutes *in pari materia*. Section 12.11, Act 986, for example, says that when an association becomes a Federal savings and loan association, "such association shall cease to be supervised by this State."

Reasonable and constitutional interpretations are favored.

II.

In addition, however, nothing the Appellee Coast Federal has done would violate the statutes.

The Appellants do not contend that the Court below erred in any of its findings of fact, and accordingly concede that the "defendant was actually transacting its business * * * strictly within the limited perimeter of its expressly authorized field." Nor do Appellants, in their "Statement of Points Upon Which Appellant Intends to Rely * * *" allege that the Court below erred in failing to find a single factual violation of Section 12 or Section 12a. An analysis of the record shows that no finding of such a violation could have been based on the evidence.

III.

Since California Bank Act sections 12 and 12a do not apply to Federal savings and loan associations, we do not have to reach the question of whether California would have violated the Federal Constitution if the sections did apply, which is the only question the Appellants argue in their Opening Brief. However, it is clear that if a state wanted to apply the provisions of 12 and 12a to a Federal, it could not be done.

A state cannot prevent the Federal Reserve Banks, the Federal Home Loan Banks, the Federal Land Banks and the Federal Intermediate Credit Banks from calling themselves "banks." It cannot prevent any of these, or Federal savings and loan associations, or the Reconstruction Finance Corporation, from performing the precise functions and using the exact phraseology directed by the Federal Government, nor could it even impose sanctions on these under the guise of supplementing Federal supervision.

Uniformity in structure, supervision and operations, including the use of uniform descriptive terms in advertising of Federal savings and loan associations, has great practical merit. But apart from its merit, uniformity is a mandate of Congress for Federal savings and loan associations (in which respect Federals differ from national banks) which must be honored by the courts. This uniformity would be destroyed if even one state could apply provisions like 12 and 12a to Federals. As a matter of fact, however, 12 and 12a would impose discriminatory burdens on Federals that would frustrate the purposes of their creation.

IV.

The Court below properly held that whether a Federal savings and loan association, conceded to be operating within its prescribed field, is accomplishing its assigned functions, is for initial determination by the Home Loan Bank Board, which must apply the standard of the "best practices" of local mutual thrift and home financing institutions in the United States.

The courts will not make such an initial administrative decision that must be based on an "intuition of experience." (*Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 598.)

ARGUMENT.

I.

The Statutes on Which the Complaint of the Appellants Rests Are, as a Matter of State Construction, Not Applicable to Federal Savings and Loan Associations or to the Appellee.

This case was tried in the District Court, testimony was taken and a final judgment rendered in favor of the Defendant-Appellee both on the facts and on the law. The entire case of the Appellants rests on their allegation that the Coast Federal Savings and Loan Association of Los Angeles has violated certain provisions of the California statutes (Secs. 12 and 12a, Act 652, Deering's Cal. Gen. Laws) set forth in the complaint which provide for the forfeiture of \$100.00 per day for transacting, or advertising the transaction of, certain business activities and for an injunction in an action to be brought by the Superintendent of Banks. Accordingly, unless the statutes set forth in the Complaint apply to the Appellee Coast Federal and unless the Coast Federal has violated them, the Appellants have no cause of action, and this appeal must be dismissed.

Sections 12 and 12a, Act 652, Deering's Cal. Gen. Laws, codified first in the Banking Code and later in the Financial Code,¹ and on which this action is attempted

¹The Complaint in this action was filed October 20, 1949. The Banking Code was adopted June 24, 1949, to be effective October 1, 1949. The alleged overemphasis by the Coast Federal of the word "Bank" in the phrase "Member Federal Home Loan Bank," complained of in the action if any there were, is conceded to have been corrected on March 1, 1949. The other matters testified to by Appellant Commissioner Sparling, as well as all those matters set forth in the Stipulation, except the use of the shortened name "Coast Federal Savings" and possibly the advertising in the Octo-

to be founded, were in existence long before the enactment of the Federal statute which authorizes the creation of the Defendant-Appellee and other Federal savings and loan associations.² Except to the extent of the codification in 1949 and recodification in 1951, these sections have not been amended during the period of existence of Federal savings and loan associations. Necessarily, therefore, whether or not the State Legislature intended these provisions to apply to Federal savings and loan associations is, as a factual matter, beyond satisfactory answer. As a matter of statutory construction, however, it is clear that the statutes are not applicable to these units of the new Federal system created by the Congress after Sections 12 and 12a of Act 652 were already yellow on the state books.

ber issue of the "Coast Federal Challenger," occurred if at all before October 1, 1949. The Complaint sets forth both the Banking Act sections and the superseding sections of the Banking Code. The Financial Code, except for Division 2 thereof which relates to building and loan associations, became effective September 22, 1951, and seems to have been intended principally as a restatement of existing statutory provisions (Financial Code, Sec. 2). Unlike the Banking Code, the Financial Code, in Division 2, includes the provisions of the acts relating to building and loan associations found in the General Laws, to be operative on the 91st day after the adjournment of the 1953 regular meeting of the legislature.

²Federal savings and loan associations were authorized by the Home Owners' Loan Act of 1933. Section 12, Act 652, Deering's Cal. Gen. Laws, was first enacted in 1909 (Stats. 1909, p. 89), and was amended in 1911 (Stats. 1911 (Ex. Sess.), p. 115), in 1913 (Stats. 1913, p. 141), and 1929 (Stats. 1929, p. 443). Section 12a was added in 1911 (Stats. 1911, p. 1008), and amended the same year (Stats. (Ex. Sess.) 1911, p. 116) and in 1913 (Stats. 1913, p. 143). An exception for building and loan associations was first added in 1911 (Stats. 1911 (Ex. Sess.), p. 116).

A. Sections 12 and 12a Are by Their Terms Not Applicable to Federal Corporations.

Sections 12 and 12a are applicable to any "person, firm, company, co-partnership or corporation, *either domestic or foreign*" (emphasis supplied). The California Code (Corp. Code, Sec. 106) defines a domestic corporation as "a corporation formed under the laws of this state" and (Sec. 6201) a foreign corporation as "a corporation not organized under the laws of this state." A federal or national corporation, while of course not "formed under the laws" of California, the test of a domestic corporation, is nevertheless not a "foreign corporation." (*Home Owners' Loan Corporation v. Gordon*, 97 P. 2d 845, 36 Cal. App. 2d 189.) This is in accord with the holdings of the states generally, in interpreting their respective statutes, that a corporation created by the Federal government pursuant to its general power (*i. e.*, not by Congress sitting as the local legislature for a territory or the District of Columbia) is neither a domestic nor foreign corporation, particularly if a contrary interpretation would render the state statute unconstitutional. (*Homan v. Connett*, 152 S. W. 2d 1053, 348 Mo. 244; *Bezant v. Home Owners' Loan Corporation*, 98 P. 2d 852, 55 Ariz. 85; *Home Owners' Loan Corporation v. Stookey*, 81 P. 2d 1096, 59 Ida. 267; *Severson v. Home Owners' Loan Corporation*, 88 P. 2d 344, 184 Okla. 496; *Jeffreys v. Federal Land Bank of New Orleans*, 189 So. 557, 238 Ala. 97; *Home Owners' Loan Corporation v. Sherwin*, 18 N. E. 2d 992, 59 Oh. App. 567, appeal dism. *Home Owners'*

Loan Corporation v. Welsh, 17 N. E. 2d 270, 134 Oh. St. 356; *Leggett v. Federal Land Bank*, 167 S. E. 557, 204 N. C. 151, 88 A. L. R. 871; 20 C. J. S. (Corporations), Sec. 1785, p. 11; 23 Am. Jur., Secs. 8, 9 and 10, p. 21, *et seq.*; and Secs. 138 *et seq.*, p. 137 *et seq.*; Anno. 88 A. L. R. 873, 121 A. L. R. 122.)

B. Any Other Construction of Sections 12 and 12a Would Be Unreasonable and Would Cause the Sections to Be Unconstitutional. The Courts Favor Reasonable Over Unreasonable Constructions, and Constructions That Sustain the Constitutionality of Statutes Over Constructions That Render Them Unconstitutional.

Sections 12 and 12a must be interpreted as not applicable to Federal banking activities generally. Except that their application to corporations is limited to foreign and domestic corporations, which, as above discussed, do not include Federal corporations, Sections 12 and 12a carry no specific exemption for any Federal banking activities, either those in existence at the time of their enactment in 1909 and 1911 or any to be later created. Long after these California provisions were on the statute books, Congress from time to time caused new Federal banking activities and corporations to come into existence. Even as to some of the most omnipresent and now already venerated of these, California has never stated specifically the non-application of Sections 12 and 12a. Possibly the Appellants may concede that the Federal Reserve Bank of San Francisco, the Federal Reserve System's regional bank for its 12th District, is not subject to the supervision of the Appellant California Superintendent of Banks, is not required by Act 652 to report to him and needs no certificate from him to do

business in the State. But Sections 12 and 12a provide that a domestic or foreign corporation not subject to the Plaintiff-Superintendent's supervision, and not required to report to him, and which has not received a certificate to do a banking business from him, may not do a banking business and may not have a sign at either its home office in San Francisco or its branch office in Los Angeles "indicating that such place or office is the place or office of a bank" or indicating "that deposits are received there or payments made on checks, or any other form of banking business transacted." So the very name, "Federal Reserve Bank of San Francisco" would be a violation of the law.

The particular venture of the Federal government into the field of savings and of credit extension and regulation with which this action is concerned is the depression-born Federal Home Loan Bank System, the district reserve banks for which are the Federal home loan banks (12 U. S. C. 1421). Nothing in the California statute books and certainly no specific exemption in Sections 12 and 12a tells us in so many words that the provisions of Sections 12 and 12a do not operate so as to outlaw the Federal Home Loan Bank of San Francisco, the regional reserve credit institution for the 11th District, of which all Federal savings and loan associations in that district must be members (12 U. S. C., 1464(f)). Elsewhere in the statutes, however, as it has in the case of many other Federal banking and credit corporations, California recognizes the existence of the Federal home loan banks and attempts to facilitate the extension of their benefits to its people and to its own instrumentalities (Act 986, Sec. 9.06, Deering's Gen. Laws; Cal. Fin. Code, Secs. 754, 1353). It would, indeed, take a stretch of the imagination

so to interpret Sections 12 and 12a of Act 652 that the Federal Home Loan Bank of San Francisco may not, without violating the state law, call itself the "Federal Home Loan Bank of San Francisco," or engage in the precise banking functions that are specifically prescribed by Congress. In addition, such an interpretation would create a conflict between Sections 12 and 12a on the one hand, and on the other hand, the provisions of California law which recognize the operations of the Federal Home Loan Bank. Nor is it reasonable to conclude that the State Legislature in 1909 intended to restrict or prohibit altogether the activities of all corporations that Congress might thereafter create and assign some banking functions, or a banking name. To list some of these, subsequently created, which either could not use their corporate names in California under such an interpretation, or perform or advertise certain of their functions in that State, are the Federal Land Banks (12 U. S. C. 672), Federal Intermediate Credit Banks (12 U. S. C. 1021), National Farm Loan Associations (12 U. S. C. 711), Federal National Mortgage Association (12 U. S. C. 1716), the Reconstruction Finance Corporation (15 U. S. C. 601), and for that matter the two national deposit and savings insurance corporations, the Federal Deposit Insurance Corporation (12 U. S. C. 1811) and the Federal Savings and Loan Insurance Corporation (12 U. S. C. 1724). The reasonable construction that California in 1909 and 1911 did not intend Sections 12 and 12a to apply to the Federal government and its instrumentalities is favored to avoid these unreasonable consequences (Cal. Civ. Code, Sec. 3542; *Kashevaroff v. Webb* (1946), 73 Cal. App. 2d 177, 166 P. 2d 306. "* * * (I)t will not be supposed that the Legislature intended

any unreasonable consequences unless the language is so clear as to admit of no doubt," 23 Cal. Jur., Stats., Sec. 104, citing *Knox v. Wood*, 8 Cal. 542, 547; *Alameda Co. v. Kuchel*, 32 Cal. 2d 193, 195 P. 2d 17).

A California statute which so undertook to prohibit Constitutional Federal activities in California would, of course, be unconstitutional. See discussion, *infra*, Part III. The Courts prefer interpretations that uphold the constitutionality of statutes over those that would render them unconstitutional. (23 Cal. Jur., "Stats.," Sec. 131, p. 757; 5 Cal. Jur., "Const. Law," Sec. 46, p. 615; *Miller v. Municipal Court* (1943), 22 Cal. 2d 818, 142 P. 2d 297; *Shealor v. Lodi* (1944), 23 Cal. 2d 647, 145 P. 2d 574.)

There is no more justification for interpreting Sections 12 and 12a to prevent Federal savings and loan associations from using their corporate names or engaging in certain functions which the persons who happen to be in state political office at any time care to describe as "banking." The functions, by whatever name called, of the Federal reserve banks, of the Reconstruction Finance Corporation, of the Federal home loan banks, and of the Federal savings and loan associations, and the words used to describe those functions, are exactly those prescribed by the Federal government, no more and no less. An interpretation of Sections 12 and 12a that the sections do not apply to any one of these Federal activities would likewise result in their non-application to Federal savings and loan associations.

But Sections 12 and 12a of Act 652 and Sections 12.01 and 12.03 of Act 986, Deering's Cal. Gen. Laws, set out, *supra*, relate to the same subject, are *in pari materia* (*McGrath v. Kaelin*, 66 Cal. App. 41, 225 Pac.

34; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699, 708), use similar and mutually complementary language, Sections 12, 12a and 12.03 (based on Stats. 1911, p. 607, Sec. 15)³ are substantially contemporaneous, and all four should be "read and construed together, as one act, each referring to and supplementing the other * * *" (23 Cal. Jur., Stats., Sec. 163, and cases cited; also Sec. 166, and 10 Cal. Jur. Supp., Stats., Sec. 163) as "a single and complete statutory arrangement." (50 Am. Jur., Stats., Sec. 349.) Read and construed together, these sections are part of the general statutory scheme to prevent persons, whether California or foreign, who do not possess California certificates, from engaging in the financial operations to which the sections relate, and to regulate and supervise the persons to whom such certificates are awarded. If these sections apply to Federals, Federals cannot operate in California.⁴ Such a result is entirely inconsistent with the several provisions of the same Act 986 (*e. g.* 12.11, 12.12) as well as Act 988 which clearly and unequivocally recognize the legality of Federal savings and loan associations in California. An interpretation of Sections 12 and 12a that would render these other provisions meaningless is not to be favored. (23 Cal. Jur., Stats., Sec. 133.)

³See footnote 2, *supra*.

⁴Since Federal savings and loan associations are not building and loan associations as defined in Act 986, Section 1.02, they did not, at least until 1939, come within the exceptions of Sections 12 and 12a of Act 652 for building and loan associations. Act 988 (Stats. 1939, Chap. 525) provides in part that Federals and their members shall have all the rights of state building and loan associations and their members. However, Federals cannot operate under the State statutes (which provide for taking over by the State and have numerous provisions in conflict with Federal regulations for Federals) and so would be no better off now than they were before 1939.

C. Consistently, California State Supervisory Statutes Have Been Administratively Interpreted as Not Applicable to Federal Savings and Loan Associations Since Federal Savings and Loan Associations Were First Authorized in 1933.

From 1933 to 1950 there is no record of any attempt by California supervisors to regulate the regional Federal home loan bank or any Federal savings and loan association under an interpretation of Sections 12 and 12a.

One searches in vain through the extensive annual reports of the California Building and Loan Commissioner and the equally detailed reports of the California Superintendent of Banks from 1933 to the present date for any indication that any one of the several holders of these two responsible positions ever contemplated that a Federal savings and loan association, if legally in existence as such,⁵ was subject to state supervision or regulation. On the contrary, while state control over "foreign" associations is repeatedly emphasized, Federals are inferentially conceded to be beyond state supervision in every annual report of the Building and Loan Commissioner. This was the history when, in 1949 and again in 1951, the California Legislature codified the two sections, retaining their basic language. The Legislature is not assumed to have ignored so long a history of administrative interpretation of the language it reenacted (*Riley v. Thompson*, 193 Cal. 773, 227 Pac. 772; *Nelson v. Dean* (1946), 27 Cal. 2d 873, 168 P. 2d 16, 21).

⁵In the 42nd Annual Report of the Building and Loan Commissioner for the year 1935, p. 113, the legality of some conversions from state to Federal charter is questioned, and the constitutionality of the Federal system is incidentally discussed.

D. California Statutes Clearly Contemplate That Federal Savings and Loan Associations Are Not Subject to State Regulation.

As discussed, *supra*, interpreted as Appellants would have this Court interpret Sections 12 and 12a of Act 652, Section 12.01 of Act 986 would have prevented any Federal savings and loan association from doing business at all in California until 1939 (Act 988, Deering's Gen. Laws; Cal. Stats. 1939, Ch. 525) and even now would place on them the impossible condition that they carry on their business only in accord with Act 986, which includes provisions for the taking over of associations by the Building and Loan Commissioner.

Nowhere is there any indication of such a harsh attitude on the part of the State Legislature toward Federal credit agencies. The attitude of the Legislature, and its intention that none of its supervisory statutes apply to Federal savings and loan associations, is stated in so many words in Section 12.11 of Act 986:

“At the time when such conversion (of a state association into a Federal savings and loan association) becomes effective * * * such association shall cease to be supervised by this state * * *.”

See also definition of “securities” in Section 16.01.

And the California Courts have shown no different attitude. (See *Eddy v. Home Federal Savings and Loan Association*, 60 Cal. App. 2d 42, 140 P. 2d 156; and *H. O. L. C. v. Gordon*, 36 Cal. App. 2d 189, 97 P. 2d 845.)

II.

No Actions of the Defendant-Appellee Coast Federal Have Violated Any of the Statutes Set Forth in the Complaint.

A. By Whatever Term That Field Is Described, the Appellee Coast Federal Has Transacted Its Business Strictly Within Its Lawful Field.

There were two witnesses at the trial, Witness Sparling, the Plaintiff Superintendent, in his own behalf, and the other Witness McMahon, on behalf of the Coast Federal. Witness McMahon set out in detail the manner in which the Coast Federal conducts its business [R. 210].

Any stranger entering the office of Coast Federal for the first time to place his savings with the Appellee receives either investment certificates in \$100.00 amounts or a savings share account passbook [R. 210, *et seq.*]. In either event he must execute an application for membership in the "Coast Federal Savings and Loan Association of Los Angeles" [R. 212]. Both the certificate [R. 211, Ex. A] and the passbook [R. 211, Ex. B] clearly evidence the precise relationship between the investor and the Coast Federal. Nor is there any allegation that the forms are not those prescribed according to Federal regulation (24 C. F. R. 143.6 (1950 Supp., 145.2)). Also, the charter and by-laws of the Coast Federal are likewise made available to each new member [R. 217]. These, of course, clearly set out the form of organization [R. 217, Ex. E]. As against this direct showing the Appellants made no serious effort to sustain their allegation that, in violation of California statutes, the "defendant solicited and received deposits and transacted business in the way and manner of a bank and a savings bank * * *" [R. 16, Par. IV].

The District Judge found in part as follows:

“No evidence was offered which would support a finding that defendant was actually transacting its business other than strictly within the limited perimeter of its expressly authorized field” [R. 108].⁶

This Finding of the District Court is not challenged in any way by the Appellants in their “Statement of Points Upon Which Appellants Intend to Rely and Designation of Record” [R. 236]. Nor in fact do the Appellants contend in their Opening Brief either that the District Court erred in so finding or that anything developed at the trial in any way that would have supported any contrary finding. No distinction is made in the Finding between Federal and state authority. Therefore, it cannot now be contended, in this appeal, that the Coast Federal has operated in any field other than that lawfully assigned to it, by whatever name called.

B. No Advertising of the Coast Federal Would Have Violated Sections 12 or 12a if Applicable.

For reasons set forth in the preceding part of this Brief, it is proper, by way of example, for this Appellee to call the funds entrusted to it “savings accounts” and for purposes of convenience to refer to itself on occasion by an abbreviation of its full name, as “Coast Federal Savings,” regardless of what the provisions of Sections 12 and 12a are. These two sections were never intended to have any application to this Appellee. But even if these sections were intended to (which they were not) and constitutionally could (which they could not as is herein later

⁶This sentence appears in the Opinion of the Court which was adopted as its Findings of Fact and Conclusions of Law [R. 135].

set forth) apply to Federal savings and loan associations, the judgment below should be affirmed in any event for the simple reason that nothing Coast Federal has done would be in violation of those sections.

It is apparent from the Complaint itself and from the testimony of the Appellant State Superintendent of Banks that over a period of many months he closely observed the advertising of the Coast Federal. Also, from the record and testimony as a whole it is clear that the Coast Federal, the largest local mutual thrift and home financing institution in the West and the largest Federal savings and loan association in the United States [*Savings and Loans News*, March, 1951, p. 36; R. 218, Ex. G], advertised extensively, and the Courts may judicially note that large financial institutions commonly advertise, using the normal media. The Appellant Superintendent of Banks has abandoned the charge in his Complaint that the Coast Federal unlawfully conducts a "banking business," in violation of California statutes, limiting his appeal to charges involving Coast Federal's advertising. It is significant that, out of the Appellee's fifteen years of extensive advertising the Appellant Superintendent has selected certain items, and we submit, has taken those items out of context, for his charges.

Witness Sparling, the Appellant Superintendent of Banks, testified that some time in December, 1948, the exact date of which he was uncertain, he heard a reference "to the banking office of Coast Federal Savings at 8th and Hill Streets, Los Angeles" in a radio advertisement of the Appellee [R. 200]. No attempt was made to prove that the particular broadcast was authorized by the Appellee. Witness Sparling stated that he wrote to

the President of the Appellee to complain about this supposed broadcast reference to "banking office." Mr. Sparling received a reply in which Coast Federal stated it had no knowledge that the term had been used in its advertising, but did not preclude the possibility that, "since there is no law against it and no misrepresentation," the term might have been included to "pad" an announcement in order to fill up the allotted time of a commercial on a small station [R. 202]. Witness Sparling conceded that to his "recollection" he heard such a reference only "once or possibly twice" [R. 203]. He could not identify the radio station or date [R. 198-199]. In their Brief, the Appellants state that it is "uncontradicted" that the Appellee referred to its place of business as "banking office" in its radio advertising. Quite to the contrary, with no more than the Appellant-Superintendent's vague recollection of an unidentified broadcast from an unidentified station the District Court did not and could not make a finding that the term was used, and the Appellants did not even see fit to include in their "Statement of Points Upon Which Appellant Intends to Rely" [R. 236] any allegation that the District Court erred in omitting such a finding.

In addition to the testimony of Witnesses Sparling and McMahon, there is in evidence a Stipulation executed by the parties for the purposes of trial [R. 93]. This Stipulation sets forth that on or about November 1, 1948, up to about March 1, 1949, the Appellee used certain signs in its windows. In one first-floor window was the legend "Coast Federal Savings" with the word "Coast" in large letters. In the next window separated from the first by a substantial tier of masonry were the words "Member

Federal Home Loan Bank” with the word “Bank” similarly emphasized. In other windows, all ground level and each likewise separated from the other by substantial tiers of masonry, were the legends “Federal Insurance,” “Savings Accounts” and “Member Federal Home Loan Bank” with the words “Federal,” “Savings” and “Bank” in larger letters than the other words. The Court below found in its Opinion adopted as its Findings [R. 135]:

“Through emphasis upon certain words used in adjoining window signs, the very myopic would read, from a distance, ‘Coast Federal Savings Bank.’ Supervisory personnel of the Board saw such signs frequently. They were removed at the request of the Board about seven months before this action was commenced, but only after the Board received complaints, including those of the Superintendent. Thereafter, Defendant’s signs recited that it was a ‘Member of Federal Home Loan Bank,’ without emphasizing the word ‘Bank.’” [R. 108-109.]⁷

The Stipulation also sets forth that the alleged over-emphasis in these signs of the word “Bank” was discontinued about March 1, 1949, after it was called to the attention of the Appellee by the Appellant Commissioner and by a representative of the Home Loan Bank Board, the Federal supervisory body [R. 108, 94 *et seq.*, 204 *et*

⁷Unlike a camera focused from a precise, distant vantage point, with the printed picture a miniature of the actual scene, a person walking on the sidewalk by the windows would be able to read the sign on only one window, and every word on that sign would be in large letters easily legible even to the “very myopic.” See, for example, Exhibits A and B to the Complaint [R. 59, 60]. Even these exhibits necessarily reduce the size of the signs to a tiny fraction (compare size of passing persons) and are taken from a distance. In Exhibit B [R. 60] for example, the street trolley tracks are in the picture itself.

seq.]. The signs were always accurate. After about March 1, 1949, the signs used by the Defendants merely recited that it was a "Member of Federal Home Loan Bank" without emphasizing the word "Bank." The Complaint was filed on November 3, 1949. Referring to these signs, the Appellants say this Appellee has "clearly * * * violated the state law by overemphasizing the word 'Bank' in its building sign, by making its place of business appear to be 'Coast Federal Savings Bank.'" Again, however, the Appellants did not include any allegation in the "Statement of Points Upon Which Appellants Intend to Rely" that the District Court erred in its finding or that there should have been any further finding. The Federal statutes make the term "Federal Savings" the exclusive property of the Federal savings and loan system (18 U. S. C. 709; 12 U. S. C. 1464a, 1725g). There is no such thing as a "Federal Savings Bank." So, even the "very myopic" undertaking to read the ground level signs from a selected vantage point at "a distance" could not have been misled, and one does not transact business with a bank, or Federal savings and loan association, "from a distance" [R. 108]. Indeed, Appellant-Commissioner reluctantly conceded he did not know of a single case of a person who ever has been misled as to Appellee's nature or services [R. 207].

The same Stipulation contains statements concerning the "Coast Federal's Challenger," a quarterly publication of the Appellee. In general, the Appellee used the word "savings," the term "savings account" and in a single instance referred to "interest" on "your savings account." While "earnings" or "dividends" or "your interest in the earnings of the Association" may have been better terms

than “interest,” there is no showing whatsoever that the Coast Federal, in even one instance, used the terms “notes” or “deposit,” the essentials of any violation under Sections 12 and 12a. California building and loan associations lawfully use the term “interest” (*e. g.*, Sec. 8.09, Act 986, Cal. Gen. Laws). Sections 12 and 12a do not undertake to make the use illegal. The Commissioner-Appellant’s Complaint [R. 12, Par. IV, R. 14] of the use of the very terms “savings account” and “savings” that are set forth in the Federal regulations and statutes (12 U. S. C. 1464, 1724; 24 C. F. R., 1950 Supp., 141.4, 145.1) graphically illustrates the dilemma in which all Federal savings and loan associations in California would find themselves if the Commissioner were able to extend his jurisdiction as he here attempts.⁸

The Appellee uses singing commercials in its advertising. However, the Appellee also awards a prize for the best letter on “Why I Hate Your Singing Commercial.” The October, 1949, issue of its “Challenger” lists six winners of such prizes. The first winner listed “complained that her baby’s first words were ‘Cos Fed saves mo’—instead of ‘Mama.’” [R. 42.] But it is to the award of the next such prize that the Appellant Commissioner complains. The winner of the next \$25.00 prize was one Mrs. Mabel E. Smith, who made the rather startling suggestion that the Appellee use a “dignified slogan” in its singing commercials. Mrs. Smith gave an example of what she meant by a dignified slogan: “Our

⁸Section 3394 of the Banking Code (Op Br. p. 11) forbids any *Bank* which has not received a certificate from advertising that it receives “savings.” As discussed *supra*, this shows the legislative intention that the statutes were not intended to apply to federally chartered financial institutions.

business is banking; our banking is business. We solicit your banking business.” While the record does not show whether the Appellee adopted the suggestion that it use a “dignified slogan” in its advertising, the parties have stipulated that the Appellee did not use the example given by Mrs. Smith, in its singing commercials or at all, except to the extent that the listing among the six award winners may be “use” [R. 98]. The page of the publication appears at R. 42. On the same page the words “Coast Federal Savings and Loan Association” are set out in such large letters as to be able to cover the fine print reference to Mrs. Smith’s contribution. The page does not represent the Coast Federal to be anything but what it is, and no one could be misled by anything on it.

The Stipulation sets forth the use of the shortened term “Coast Federal Savings” in advertising. As discussed *supra*, statutes of the United States restrict the use of the words “Federal savings” to Federal savings and loan associations, and no other financial institution can use the term. Nothing in statutes or regulations forbids the use of the shortened description by Federals. In fact, the duly constituted Federal supervisors expressly and publicly recognize the practical necessity of the shortened descriptive custom (See The National Savings and Loan Journal, July, 1949, p. 6 *et seq.*), and the regulations themselves, rather than use the whole corporate name in each reference, repeatedly use “Federal association” (24 C. F. R., 1950 Supp., 141.2, *et seq.*). The Stipulation further contains, as an exhibit, a copy of an ad once published in a Los Angeles newspaper which contains the statement that a “Coast Federal Savings bank” will be given with each savings account, which “bank” is

to be an exact copy of the Coast Federal's office [R. 103]. The award of a penny bank copied after the Coast Federal's office is not a representation that the Coast Federal is other than a Federal savings and loan association.

III.

The Operations of Federal Savings and Loan Associations Are Subject to Federal Regulation Exclusively.

The opinion below should be affirmed without entering into the constitutional question. Since the opening brief of the Appellants concerns itself exclusively with the constitutional question, and since we believe it clear that no state could, if it wished, undertake the supervision of Federal savings and loan associations, the reasons for our view are, nevertheless, here set out.

A. Congress, in Creating Federal Savings and Loan Associations, Directed and Intended That They Be Supervised Exclusively by the Federal Government.

1. Federal savings and loan associations were created to be instruments of the Federal government to accomplish specified constitutional purposes.

Federal savings and loan associations are authorized by Section 5 of the Home Owners Loan Act of 1933 (12 U. S. C. 1464). This was the second of the three major legislative enactments by which the Congress undertook to release the national savings and home credit structure from its frozen position of the early thirties and to establish the mechanism for its future progressive development. The first of these three enactments attempted in 1932 to create for the nation's savings and home financing

institutions a reserve credit structure roughly comparable to the Federal Reserve System that had existed for almost twenty years to the tremendous advantage of the nation's commercial banks. This was the Federal Home Loan Bank Act (12 U. S. C. 1421 *et seq.*). A year later, Congress passed the second of the enactments, that with which we are most directly concerned, the Home Owners Loan Act of 1933. Two major aspects of the then unfortunate situation in the thrift and home financing structure were met by this legislation. The first of these, the emergency then existing in which the principle of home ownership was more seriously threatened than at any time before or since in our history, was attempted to be alleviated by the creation of the Home Owners Loan Corporation. Solely an emergency and temporary device, this Corporation was assigned by the statute a brief period of active operation.

The second aspect of the serious situation of 1933, sought to be met by the Home Owners Loan Act of 1933, was the great need for a uniform national system of local mutual thrift and home financing institutions. This second aspect of the Home Owners Loan Act of 1933 was, accordingly, a long-range effort at basic structural alteration which has in the intervening years demonstrated itself to have been one of the most significant and successful undertakings in the financial history of the United States. The Congress directed the Home Loan Bank Board, an agency of the United States, to establish a uniform system of local mutual thrift and home financing institutions throughout the country "in order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing

of homes," to be known as "Federal savings and loan associations" (12 U. S. C. 1464). It is difficult nineteen years later to recreate in our minds the situation that then confronted the Congress, but perhaps it is possible by looking back to recall the position of those persons who at that time desperately needed and could not get loans to retain their family homes, the market value of which had suddenly and almost hopelessly deflated but which still served for them and their families the same functional purpose that homes served before market conditions changed.

The third of the major congressional enactments that were intended to correct the then existing situation was Part IV of the National Housing Act of 1934. This legislation created the Federal Savings and Loan Insurance Corporation, the duty of which would be to insure the savings accounts of all Federal savings and loan associations, and which corporation was given the option of insuring the savings in specific other thrift and home financing institutions (12 U. S. C. 1724 *et seq.*).

Accordingly, the functions assigned by Congress to Federal savings and loan associations are the promotion of thrift and home financing, and certain other functions as fiscal agents of the United States (12 U. S. C. 1464(a) and (k)). A board appointed by the President with the advice and consent of the Senate is directed to provide for their "organization, incorporation, examination, operation and regulation." The United States Government extended funds to these newly created instrumentalities in order to give them the impetus to perform their congressionally assigned functions. This investment by the government was authorized to the extent of three dollars for every dollar of private savings entrusted to the particular

association (12 U. S. C. 1463(n), 1464(g) and (j)). The extent of exemption from taxation has been specific (12 U. S. C. 1464(h)). See also 26 U. S. C. Sections 101, 104. One hundred million dollars additional of Government money was advanced as the initial capital of the Federal Savings and Loan Insurance Corporation (12 U. S. C. 1725).

Obviously, Federal savings and loan associations are performing functions assigned by Congress in the promotion of thrift and home financing, and for purposes of fiscal agency. They have accordingly been held to be "instruments" or "instrumentalities" for this purpose. (*Federal Savings and Loan Insurance Corporation v. Kearney Trust Co.*, 8 Cir., 151 F. 2d 720, 725; *North Arlington National Bank v. Kearney Federal Savings and Loan Association*, 3 Cir., 187 F. 2d 564; *First Federal Savings and Loan Association v. Loomis*, 7 Cir., 97 F. 2d 831, 121 A. L. R. 99, cert. dismissed, 305 U. S. 666; *Community Federal Savings and Loan Association v. Fields*, 8 Cir., 128 F. 2d 705; *First Federal Savings and Loan Association v. Danahar*, 128 Conn. 78, 20 A. 2d 455, 463-464 (1941); *State v. Minn. Federal Savings and Loan Association*, 218 Minn. 229, 15 N. W. 2d 568 (1944).)

Regardless of whether we call these associations "instrumentalities," their operation is an activity the regulation of which Congress could preempt. The important consideration is not the label "instrumentality," but the fact that Congress has expressly preempted the entire field to the exclusion of state supervision and regulation.

2. Congress preempted the entire field of supervision and control of Federal savings and loan associations.

The plenary delegation by the Congress to the Home Loan Bank Board is in the most general and all-inclusive

of terms. The Congress delegated to the Home Loan Bank Board supervision and control over all operations of Federal savings and loan associations, such supervision and control to be exercised on a uniform national basis (12 U. S. C. 1464). It is difficult to conjecture more enveloping words than those of 5(a), "organization, incorporation, examination, operation and regulation" and the issuance of charters. In this respect, unlike national banks which are chartered by Congress, and unlike any other corporations which may receive their existence pursuant to general incorporation statutes, Federals look to an agency of the Executive Branch of the government for their corporate existence, which agency in turn has derived its authority from this exhaustive delegation. (*Keifer and Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 392; *North Arlington National Bank v. Kearney Federal Savings and Loan Association*, 3 Cir., 187 F. 2d 564; *Federal Savings and Loan Insurance Corporation v. Kearney Trust Co.*, 8 Cir., 151 F. 2d 720; *cf.*, *Fahey v. Mallonee*, 332 U. S. 245.)

The Board, in turn, has regulated all aspects of the creation, operation and corporate life of Federal savings and loan associations. Federal savings and loan associations operate under detailed regulations and instructions prescribed by the Home Loan Bank Board. These regulations are found in 24 C. F. R., Sections 141 *et seq.* In addition, by reason of the fact that the law requires that all accounts in Federal savings and loan associations be insured by the Federal Savings and Loan Insurance Corporation, these Federal associations are likewise subject to these additional regulations of the Home Loan Bank Board which appear in 24 C. F. R., Sections 161, *et seq.* The District Court, having looked at the

Board's regulations, was impelled to comment: "The Board has adopted extensive rules and regulations concerning the powers and operations of every Federal savings and loan association from its cradle to its corporate grave" [R. 111].

B. Any Attempt by States to Regulate or Supervise Federal Savings and Loan Associations Must Necessarily Be an Unconstitutional Inference With the Federal Government.

The Appellants' Opening Brief in this connection contends:

(1) That Federal savings and loan associations are not instrumentalities of the United States (Op. Br. 15), and that cases (Op. Br. 22 *et seq.*) which say so as a matter of fact do not so hold.

(2) That railroads created in specific acts of incorporation by Congress, or persons performing services for a government, may, nevertheless, be subjected to taxation (Op. Br. 16).

(3) That a state-chartered building and loan association which is a member of the Federal Home Loan Bank System is not thereby exempt from state taxation (Op. Br. 18).

(4) That a private insurance corporation owning stock in a Federal Home Loan Bank may, nevertheless, be subjected to state taxation (Op. Br. 20).

(5) That property of a government instrumentality may not be immune from attachment (Op. Br. 21).

This is not a case involving taxation. If it were, it would be decided on the basis of the specific Federal statutory provisions that govern the taxation of Federal savings and loan associations. (See 12 U. S. C. 1464(h).)

Accordingly, we see no reason to enter into a discussion of the extent to which Congress has subjected Federals to taxation. Likewise, this is not a case involving an attachment of property. Federals are “sue and be sued” corporations [24 C. F. R., 1950 Supp., 144.1; R. 217, Ex. E] and may eventually be held to be subject to various incidents of litigation, but that too is a matter of Congressional intent.⁹ Certainly, we do not contend that any state chartered building and loan association, an instrumentality of a state which, with the consent of its sovereign, happens to be a member of a Federal Home Loan Bank, is in any way removed from the control of the state for tax, supervisory, or other purposes, by becoming such member.

The question here is one of Federal or state supervision and regulation of the every day operations of a Federal savings and loan association. As we have seen, the exclusive authority to create and regulate a uniform system of Federal savings and loan associations has been delegated by the Congress to the Home Loan Bank Board.

Accordingly, the operations of these associations must be controlled by Federal, not state, law.

⁹See, however, *Van Reed v. People's National Bank*, 198 U. S. 554, 557, in which the Supreme Court said, in holding that there could be no state court attachment of national banks (198 U. S. at 557):

“* * * National banks are quasi-public institutions, and for the purposes for which they are instituted are national in character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit. * * *.”

In ruling with respect to the Liberty Federal Savings and Loan Association of Liberty, Missouri, the Eighth Circuit Court said:

“If this were not true the consequences resulting from the violation of statutory prohibitions enacted by Congress for the protection of these national institutions would be subject to conflicting local laws unrelated to the uniform purpose of the Acts.” (*Federal Savings and Loan Insurance Corporation v. Kearney Trust Co.*, 8 Cir., 151 F. 2d 720 at 725; see also *Eddy v. Home Federal Savings and Loan Association*, 60 Cal. App. 2d 42, 140 P. 2d 156.)

That decision of the Eighth Circuit with respect to Federal savings and loan associations is consistent with the general principle that “the national purpose to establish uniformity necessarily excludes state regulation” (*International Shoe Co. v. Pinkus*, 278 U. S. 261, 265) and with the further principle that when Congress intends that a field of regulation within the Federal Government’s authority be occupied exclusively by the Federal Government, regulations of the state in that field are of no force or effect (*Amalgamated Ass’n v. Wisconsin Bd.*, 340 U. S. 383).

The Congressional mandate of a uniform system of Federal savings and loan associations would be nullified by the application of state supervision.

The defendant Federal savings and loan association is operated as one unit in a system of more than 1500, in accordance with the Congressional mandate, under uniform standards prescribed for the conduct of its business as well as for its creation (*Federal Savings and Loan Insurance Corporation v. Kearney Trust Co.*, *supra*). Once state statutes are applied to regulate these operations, to

that extent a Federal must conduct or advertise its business differently than the Federal savings and loan associations in another state. Historically, there is sound basis for the rule of uniformity for, while local mutual thrift and home financing institutions "have proved to be the most economically conducted financial institutions in the world, and have, generally speaking, suffered the least financial loss," organizations have sometimes come into existence which have not been established along "the same sound principles" to the confusion of the small saver (*White v. Wogaman*, 54 P. 2d 793, 796, 798, 47 Ariz. 195). It cannot be expected that every person become a legal and financial expert before placing his small savings with a particular financial institution. Now that Federal savings and loan associations have become widely known over the country as uniform local mutual thrift and home financing institutions, their sound, economical operations and the standard terms used to describe their uniform operations have become familiar to millions of savers and home-owners. This is, indeed a most valuable factor in the tremendous public confidence that these institutions have engendered.

But, nevertheless, regardless of its merits or demerits, uniformity is a prescription of Congress which must be respected.

C. As a Matter of Fact, the Contentions of the Plaintiffs, in This Action, Would if Sustained Frustrate the Purposes of the Home Owners' Loan Act of 1933, and Discriminate Against Federal Savings and Loan Associations to the Advantage of Competing State Instrumentalities.

In the case of national banks, the courts have held that Congress established a system whereby the individual instrumentalities would exercise the powers set out in the

legislation subject to state laws that did not discriminate against them, or hamper their operations, or conflict or interfere with Federal law or supervision (*Easton v. Iowa First National Bank*, 188 U. S. 220; *First National Bank v. California*, 262 U. S. 366; *Missouri, ex rel. Burns National Bank v. Duncan*, 265 U. S. 17; *Anderson National Bank v. Lockett*, 321 U. S. 233). In this respect the National Banking Act differs from the Home Owners' Loan Act which, as we have just discussed, makes a plenary delegation to the Home Loan Bank Board, from which in turn the Federal associations derive their powers.

But even by the standards applied to state legislation undertaking to regulate the activities of national banks, Sections 12 and 12a could not operate against Federal savings and loan associations.

The Appellants' Opening Brief (Op. Br. 26) discusses *State v. Peoples National Bank*, 75 N. H. 27, 70 Atl. 542, stating that the case "held that a national bank was subject to the state law providing that no person shall advertise or hold itself out as a savings bank except a savings bank incorporated in the State of New Hampshire." The most casual reading will demonstrate that is not the holding of this case, but rather that the Court expressly refrained from ruling on that point.

Anderson National Bank v. Lockett, 321 U. S. 233, holds that a state escheat statute neither discriminates against nor imposes any burden upon national banks. Indeed, it is difficult to conceive how the substitution of itself by the state as the holder of a dead account could be a burden on the bank (*Roth v. Delano*, 338 U. S. 226). But the opinion rests on the non-discrimination and lack of burden.

When the state legislation is of the type here involved, there is both burden and discrimination.

In *People v. Franklin National Bank*, 105 N. Y. S. 2d 81 (1951), the National Bank objected to a state statute that forbids banking institutions, except mutual savings banks and savings and loan associations, to advertise that they receive "savings." The Court recognized that commercial banks, particularly those with savings departments and including national banks, were in competition with savings and loan associations and mutual savings banks. Although national banks were treated equally with their opposite state numbers, this discrimination in favor of savings and loan associations was held to be sufficient to invalidate the state statute. In fact, even the attempt by a state to impose a penalty on a national bank for doing exactly what it is forbidden to do under Federal law is invalid, for if the Congress wanted to impose sanctions, it would do so (*Lauer v. Bayside National Bank*, 244 App. Div. 601, 280 N. Y. Supp. 139 (1935); see p. 6 *et seq.*, U. S. *Amicus* brief).

Federal savings and loan associations do not compete only, or even principally, with state building and loan associations. Federals are modelled after the "best practices" of mutual savings banks, cooperative banks, mutual savings and loan associations and other local mutual thrift and home financing institutions in the United States and not those of any one state (12 U. S. C. 1464). But Federals may exercise only the uniform powers given them by Federal authority. The Plaintiffs, however, would say to Federals that they may exercise only such of these powers as California may also happen to have given state building and loan associations. Since Federals are not replicas of California building and loan associations, the

Federals may need certain powers not given to the state institutions, while state statutes undertaking to give them certain powers that state building and loans have (*e. g.*, the authority to issue interest-bearing investment certificates) would be useless to Federals in view of their corporate structure (12 U. S. C. 1464a, b) so that Federals would be at a competitive disadvantage even with state building and loans. However, Federals compete for savings and for home mortgages with state commercial banks. They do not do "a general banking business" but "do some of the things which banks do, obviously" (*North Arlington National Bank v. Kearney Federal Savings and Loan Association*, 3 Cir., 187 F. 2d 564, at page 567). Accordingly, the attempted imposition by the state, as distinguished from the Federal Government, of competitive disadvantages with respect to these institutions would also be unconstitutional discrimination even if the state imposed the same or similar disadvantages on its own building and loan associations (*People v. Franklin National Bank*, 105 N. Y. S. 2d 81 (1951)).

The policy of the California state supervisory statutes is illustrated by the fact that \$603,902,370.86, out of a total of \$640,563,300.96 of all assets held by California chartered building and loan associations are held by capital stocks as distinguished from no-capital-stock mutuals. (Taken from Detailed Statement of Condition of Each Building and Loan Association in California, Table 6, 57th Annual Report of the Building and Loan Commissioner, for the Year Ending December 31, 1950.) Mutual savings banks are not common in California. See 41st Report, Superintendent of Banks, as of the close of June 30, 1950.

The state supervisors recognize that there is a "basic difference" between capital stock building and loans and mutual building and loans. (55th Annual Report of the Building and Loan Commissioner, for the Year 1948, p. 12.) Actually, "at first, all building and loans in California operated on a mutual plan. Later, a different method was developed in California which became known as the guarantee plan * * * under which most of the California associations function * * *." (41st Ann. Report, Building and Loan Commissioner, for the Year 1934, p. 125.) This development was under analysis by the *Report of the Select Committee of the Assembly for the Purpose of Investigating the Building and Loan Situation in the State of California*, which is set forth in the 41st Annual Report of the Commissioner, *supra*.

California may be wise in encouraging the capital stock form of organization rather than the mutual in this field. That is a purely political decision reserved "to the political departments of the government, Executive and Legislative." (*Chicago & S. Air Lines v. Waterman Corp.*, 333 U. S. 103, 111.) It is not for the Federal government or the Federal courts to criticize California State policy. There is no need to enter into a discussion of which policy is wiser, the State or Federal. Neither has the right to inflict its regulations on the others, or to subject the instrumentalities of the other to a cross-fire.

In particular, it is not for the State of California to decide whether or not Federal savings and loan associations may be referred to as "banks" or "banking institutions."

As we have seen, Federal savings and loan associations are modeled after "the best practices of local mutual

thrift and home financing institutions in the United States,” and while they do not do “a general banking business,” do “some of the things which banks do, obviously.” (*No. Arlington National Bank v. Kearney Federal Savings and Loan Association, supra*, at p. 567.) In the State of New York, for example, are many mutual savings and loan associations which are quite prosperous, and successfully compete with commercial banks and other capital stock financial corporations. These mutual savings and loan associations are specifically referred to in legislation as “banking organizations.” (4 Pt. 1 McKinney’s Laws, Sec. 2(11).) One of the outstanding types of thrift and home financing institutions in Massachusetts is the “cooperative bank.” Analytically, the corporate structure of cooperative banks is very similar to that of Federal savings and loan associations (5 A Ann. Laws, Mass., Ch. 170, Sec. 1, *et seq.*), and they are officially called “banks.” (5 A Ann. Laws, Mass., Ch. 167, Sec. 1.) These cooperative banks are prosperous and successfully compete with other financial institutions.

But it is not only in the Northeast that local mutual thrift and home financing institutions, including savings and loan associations, are commonly referred to as “banks.” In the leading case on the delegation of authority over Federal savings and loan associations by the Congress to the Home Loan Bank Board, the United States Supreme Court used “banking” (p. 250), “banking enterprise” (p. 250), “state and Federal banking statutes” (p. 253), “history and customs of banking” (p. 254), and “public banking business” (p. 256), all in reference

to Federal savings and loan associations. (*Fahey v. Mallonee*, 332 U. S. 245.)¹⁰ Recently, thrift and home financing institutions generally have been classified as "banks" in the Federal revenue statutes. (26 U. S. C. 104.) Whether Federal savings and loan associations should, or should not, refer to themselves as "banking institutions" is for determination by Federal authorities, according to a uniform national rule.

Apart from "bank" and "banking business," the Complaint of the Plaintiffs seems mostly concerned with the term "savings" and "savings account" [R. 11, *et seq.*]. In New York, where local mutual thrift and home financing institutions are prosperous and numerous, the statute prescribes that only savings and loan associations and mutual savings banks may advertise that they receive "savings," and that other banks may not (4 Pt. 1 *McKinney's Laws*, Sec. 258). It is not for the Courts to say whether the policy of California or New York is right, but in turn, neither New York or California may inflict its limitations on one form or the other of Federal financial institutions. See *People v. Franklin Savings Bank*, 105 N. Y. S. 2d 81, the corollary of the case at bar.

The question is one of major concern to Federal savings and loan associations.

The question of the application of Sections 12 and 12a, and of the applicability generally of state supervision, to Federal savings and loan associations is a grave and serious one to the associations.

¹⁰This is not a matter of careless use of terms by the Supreme Court. It is precisely the fact that a *banking business* was involved on which the decision rested. See *Davis, Administrative Law* (West, 1951), Sec. 44, p. 155, *et seq.*, and also other discussions of *Fahey v. Mallonee* at pages 52 and 260.

The Federal Government says in its Brief that institutions such as this Defendant need to advertise "savings" in order to perform their functions (Gov. Brief p. 23. See also Speech of the Chairman of the Home Loan Bank Board, p. 6, *et seq.* of the July, 1949 issue of the National Savings and Loan Journal, for the position of this Defendant's Federal supervisors). Regardless of whether the Federal supervisors are right, this Defendant is bound on the penalty of powerful sanctions to operate as these supervisors decide. Supervisory criticism and supervisory action can reasonably be expected to follow as quickly from any omission to perform the functions assigned by statute as they would follow an improper performance of these functions. Before it can obtain a charter, each Federal savings and loan association must demonstrate the probability of its usefulness and success (12 U. S. C. 1464(e); 24 C. F. R., 1950 Supp. 143.2).

IV.

Primary Jurisdiction to Determine Under the Home Owners' Loan Act of 1933 What Are the Best Practices of Local Mutual Thrift and Home Financing Institutions in the United States Rests in the Home Loan Bank Board.

It is unchallenged that the Appellee at all times transacted its business strictly within the limited perimeter of its expressly authorized field [R. 108]. Accordingly, we do not have a case before us of a Federal instrumentality that attempted to perform functions not assigned to it by the Federal authorities. Since the Appellee was acting within its lawful field, the question of whether or not it properly acted depends on whether or

not what it did is in accord with the statutory test of "best practices" as interpreted by the Home Loan Bank Board in its regulations, for if the actions complained of are among those prescribed by the Federal law, they could not be prohibited by state statutes. (See Part III, *supra*.)

The Home Loan Bank Board is charged by statute with the exclusive authority and responsibility to make the initial determination of whether or not the operations of Federal savings and loan associations are in accord with "best practices." This responsibility having been vested in the Board, the courts will respect the statute and permit the Board to make such initial determinations (*North Arlington National Bank v. Kearney Federal Savings and Loan Association* (3 Cir.), 187 F. 2d 564).

The Congressional direction that the Board regulate according to the best practices of local mutual thrift and home financing institutions in the United States requires a knowledge of facts that "can only be known to an official or a body having wide experience in such matters and ready access to the means of information." (*Williamsport Wire Rope Co. v. U. S.*, 277 U. S. 551, 561.) Whether or not Federal savings and loan associations should be permitted to refer to themselves as "banking institutions," whether they should call the investments they offer "stock," "shares," "savings," or "savings accounts," whether they should maintain a high or low percentage of liquid assets with the related question of whether they should advertise that money invested in them is available when wanted, how aggressive their advertising campaign for savings or mortgage loans or both should be, must all be determined in the first instance by

the Home Loan Bank Board according to the "best practices" standard and in accord with the national fiscal and financial policy of the particular time. Such matters are "delicate, complex, and involve large elements of prophecy." (*Chicago and South. Airlines v. Waterman Steamship Corp.*, 333 U. S. 103, 111.) They are administrative, not judicial, decisions.

If there is any merit to any charges that may be made against any Federal savings and loan association, the courts must assume that the Home Loan Bank Board will correctly and properly handle the matter when it is presented to it. (*Fahey v. Mallonee, supra.*) We are not now concerned with the extent of judicial review after the Board has so acted, but no court has the jurisdiction to make the initial administrative determination of whether the operations of any Federal savings and loan association, which operations are conceded to be within the strict perimeter of its assigned field, are or are not in accord with the "best practices of local mutual thrift and home financing institutions in the United States." The Court below correctly held that primary jurisdiction is in the Home Loan Bank Board.

Conclusion.

It is, therefore, respectfully submitted that the judgment of the District Court be affirmed.

Respectfully submitted,

FRANK P. DOHERTY,
CRAIL & CRAIL,
JOE CRAIL,
WILLIAM F. MCKENNA,
JAMES T. BRADSHAW, JR.,

Attorneys for Appellee.

No. 13120

United States
Court of Appeals
for the Ninth Circuit.

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

DEC 17 1951

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK



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**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ROBERT W. FULWIDER,
5225 Wilshire Blvd.,
Los Angeles 36, Calif.

For Appellee:

HUEBNER, BEEHLER, WORREL &
HERZIG,

HERBERT A. HUEBNER,

ALBERT M. HERZIG,
610 S. Broadway,
Los Angeles 14, Calif.

In the United States District Court, Southern
District of California, Southern Division

No. 5566-Y Civil

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER, Doing Business Under the
Fictitious Name of FAWN,

Defendant.

ADDITIONAL FINDINGS OF FACT ON ISSUE
OF DAMAGES AND ATTORNEYS' FEES

I.

Prior to the commencement of this suit, plaintiff John T. Gibbs had executed license agreements with several licensees, empowering them to use the game of the patent in suit No. 1,906,260, upon condition that they procure the required number of game apparatus from Gibbs, and pay him an annual royalty of Three Thousand (\$3,000.00) Dollars. Such annual royalty prevailed in the case of locations which by reason of geographical situation and population could operate at least several months of the year. Certain other license agreements provided for a lesser royalty in small locations which could only operate during brief summer periods. From the game apparatus placed with these licensees, Gibbs derived a net profit of approximately One Hundred and Fifty (\$150.00) Dollars per unit

apart from the annual royalty. [2*] Various other licenses were outstanding, but because of special circumstances which caused them to be entered into they, with one exception, do not provide a standard pattern for the purpose of determining damages herein.

II.

The exception referred to is a license from Gibbs to one Loof, et al., doing business as Skill Games, the term of which was partially contemporary with the infringing operations of defendant Todd C. Faulkner. Shortly prior to the commencement of this action, the plaintiff Gibbs entered into said license agreement with Loof, et al., for a location in Long Beach, California, on the Pike in the general neighborhood of the infringing operation conducted by the defendant Faulkner. The licensee therein paid to plaintiff Gibbs, or for his benefit, the total sum of Twenty-four Thousand, Five Hundred (\$24,500.00) Dollars during the time the license was in effect, namely from July 25, 1946, to May 1, 1950. Of this total sum Ten Thousand (\$10,000.00) Dollars was diverted to legal expenses applied primarily to the conduct of this suit. The Long Beach location of the licensee was a twelve months operation and the Long Beach operation of the defendant Faulkner was a twelve months operation. Among other provisions, it was specifically provided in said agreement that the licensee pay the plaintiff Gibbs an annual royalty of Three Thousand Dollars (\$3,000.00) for the years 1948 and 1949.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

III.

In addition to the Ten Thousand (\$10,000.00) Dollars paid by the licensee Loof for Gibbs account on litigation, Gibbs paid approximately Eleven Thousand Three Hundred (\$11,300.00) Dollars toward the cost of litigation up to and including January 6, 1950, making a total amount paid by or for Gibbs of Twenty-one Thousand, Three Hundred (\$21,300.00) Dollars, most of which amount was directly connected with the prosecution of [3] the present suit. Defendant does not question that this amount represents a fair actual cost for the services rendered and disbursements made on behalf of plaintiff. Since January 6, 1950, plaintiff Gibbs has incurred legal expenses in connection with the issue of damages for his attorneys' services in investigating the defendant's operations, taking depositions on the subject of damages, moving before this Court for an assessment of damages, preparing for hearing on the same and conducting a hearing before this Court on May 28, 1951.

IV.

The defendant Faulkner caused to be manufactured and operated on the Pike in the city of Long Beach, California, one bank of sixteen infringing game units from July, 1944, to December, 1949, and a second bank of sixteen infringing game units from August, 1944, to December, 1949, with the exception that one of said banks of sixteen units was operated for a few months by the defendant in the city of Compton, California. The use was

continuous and normally from 12 noon every day to 11 p.m. Each unit accommodated one player, and the charge per game varied from ten cents to twenty cents per player. Approximately thirty-five (35) games per hour were normally played.

V.

Evidence shows that the defendant's operation had a physical capacity for a gross income of several hundred thousand dollars per year. The defendant asserts, on the other hand, that he did not realize such an income and he claims to have obtained a total profit for the infringing operation of approximately only Sixteen Thousand (\$16,000.00) Dollars. The defendant, however, is relying upon information furnished him by employees, and no books or records supporting his contention were produced before this Court, nor were the employees called as witnesses. [4] Inasmuch as the defendant caused the infringing machines to be manufactured, the plaintiff Gibbs derived no profit from such manufacture and installation and sustained damages thereby and from loss of royalties on the infringing use.

VI.

The Court finds that a reasonable royalty to be paid by defendant to plaintiff Gibbs for infringement of his Letters Patent as hereinbefore found, would be the amount of average royalty paid by several licensees to Gibbs under the license agreements referred to in paragraph I of these findings, and also the amount of average royalty paid by

licensee Loof for the years 1948 and 1949, namely, Three Thousand (\$3,000.00) Dollars per year. Therefore, the Court finds that plaintiff Gibbs has been damaged in this action by reason of infringement of his Letters Patent by defendant, in the sum of Fifteen Thousand (\$15,000.00) Dollars, which amount is predicated on five years' operation of the infringing machines, giving the defendant the benefit of an additional free period of operation and basing no damage on loss of profits from the manufacture of the machines.

VII.

The Court in its Interlocutory Judgment allowed the plaintiff the sum of Five Hundred (\$500.00) Dollars as reasonable attorneys' fees, and the court now finds that the further sum of One Thousand (\$1,000.00) Dollars should be allowed as additional attorneys' fees, which sum is reasonable and nominal in view of the nature and extent of the litigation.

VIII.

Costs previously taxed and allowed in favor of the plaintiff in the Interlocutory Judgment amounted to Five Hundred Twenty-two and 63/100 (\$522.63) Dollars. Plaintiff has necessarily incurred as taxable costs in the prosecution of this action in this Court since affirmance of the interlocutory decree [5] the sum of....., as shown by bill of costs filed herein; which, in addition to the damages and attorneys' fees, the Court finds should be taxed as costs in this action.

Conclusions of Law

I.

Judgment should be entered herein in favor of plaintiff Gibbs and against defendant Faulkner in the sum of Fifteen Thousand (\$15,000.00) Dollars damages, Fifteen Hundred (\$1500.00) Dollars attorneys' fees, costs in the sum of Five Hundred Twenty-two and 63/100 (\$522.63) Dollars and....
..... (to be taxed) for all of which let execution issue.

/s/ LEON R. YANKWICH,

Dated at Los Angeles, California, this 15th day of June, 1951.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1951. [6]

In the United States District Court, Southern
District of California, Southern Division

No. 5566-Y Civil

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER, Doing Business Under the
Fictitious Name of FAWN,

Defendant.

FINAL JUDGMENT

This cause came on to be heard before the Court on oral testimony and documentary evidence and physical exhibits received, and was argued by counsel and an Interlocutory Judgment entered; thereafter, on appeal to the United States Court of Appeals for the Ninth Circuit, said Judgment was affirmed; thereafter, upon the granting of a writ of certiorari by the Supreme Court of the United States, and a Hearing in said Supreme Court, the Judgment of the Court of Appeals was affirmed; thereafter, this Court, having heard the parties on the question of discharge of the Special Master appointed to report as to damages, and having itself conducted a hearing and received evidence on the subject of damages and additional attorneys' fees, it is hereby [7]

Ordered, Adjudged and Decreed

I.

That United States Letters Patent No. 1,906,260

issued May 2, 1933, for a game to John T. Gibbs was good and valid in law to the date of its expiration as to claims 3, 6, 7, 8, 9, and 10, and that the title of said patent has always been vested in plaintiff.

II.

That the defendant Todd C. Faulkner infringed claims 3, 6, 7, 8, 9 and 10 by making and using the original Fawn game described and illustrated in plaintiff's Exhibit 2.

III.

That the defendant Todd C. Faulkner infringed claims 3, 9 and 10 of said Letters Patent No. 1,906,260 by making and using the altered Fawn game, said alteration being illustrated in plaintiff's Exhibit 9.

IV.

That the plaintiff John T. Gibbs recover from the defendant Todd C. Faulkner damages arising out of and accruing by the infringement by defendant in the sum of Fifteen Thousand (\$15,000.00) Dollars.

V.

That the appointment of Honorable David B. Head as Master to ascertain and take and report to the Court an accounting of said damages and to affix the same is set aside; and the Court fixes the compensation for the services of said Master at One Hundred and Fifty (\$150.00) Dollars, and the defendant Todd C. Faulkner having paid the same, it is hereby approved.

VI.

That defendant's counterclaim is dismissed upon the merits and with prejudice. [8]

VII.

That plaintiff recover from defendant Todd C. Faulkner his costs and disbursements of the suit since the affirmance of the Interlocutory Judgment, to be taxed by the Clerk in the amount of One Hundred Forty-three and 90/100 (\$143.90), to be added to costs previously taxed in the sum of Five Hundred and Twenty-two and 63/100 (\$522.63) Dollars.

VIII.

That plaintiff recover from defendant Todd C. Faulkner reasonable attorneys' fees in the sum of One Thousand (\$1,000.00) Dollars to be added to reasonable attorneys' fees in the sum of Five Hundred (\$500.00) Dollars previously adjudged.

IX.

That plaintiff have execution for such damages, costs and attorneys' fees.

X.

The patent having expired, the injunction is discontinued.

Witness the Honorable Leon R. Yankwich, Judge of the United States District Court, Southern Dis-

trict of California, Southern Division, this 15th day of June, 1951.

/s/ LEON R. YANKWICH,
Judge.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 15, 1951.

Entered June 15, 1951. [9]

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER RULE 73

Notice is hereby given that Todd C. Faulkner, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 15, 1951, and particularly paragraphs IV, VII, VIII and IX thereof.

/s/ ROBERT W. FULWIDER,
Attorney for Appellant
Todd C. Faulkner.

RWF/bdj

[Endorsed]: Filed July 14, 1951. [10]

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF
COST BOND ON APPEAL

To the Clerk of the United States District Court,
Southern District of California, Central Division:

Whereas, on June 15, 1951, judgment against the defendant Todd C. Faulkner was entered in the above-entitled case and said defendant has filed a notice of appeal from said judgment.

Now, Therefore, pursuant to local Rule 8(e) of the above-entitled court, we deposit with you herewith the sum of Two Hundred and Fifty (\$250.00) Dollars cash, of which said defendant Todd C. Faulkner is the owner, said money to be held and disbursed by you as security for costs on appeal as follows, to wit:

The condition upon which said deposit is made is that if the said Todd C. Faulkner shall prosecute his appeal with effect and pay all costs if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then said deposit shall be returned to him, otherwise to be applied by you [11] to pay such costs, and the balance if any returned to him.

Said defendant agrees by and through his undersigned attorney that in case of default or contumacy on defendant's part, the court may upon notice to him of not less than ten (10) days proceed summarily and render judgment against him in accord-

ance with his obligation above recited and award execution thereon.

/s/ ROBERT W. FULWIDER,
Attorney for the Defendant-Appellant Todd C.
Faulkner.

State of California,
County of Los Angeles—ss.

On this 13th day of July, 1951, before me, Betty Daxon, a Notary Public in and for said County and State, personally appeared Robert W. Fulwider, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ BETTY DAXON,
Notary Public in and for Said
County and State.

My Commission expires Sept. 25, 1953.

RWF/bdj

[Endorsed]: Filed July 14, 1951. [12]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR DOCKETING
APPEAL AND FILING RECORD THEREON**

The Defendant-Appellant, Todd C. Faulkner, having on July 14, 1951, filed his Notice of Appeal and on September 10, 1951, his designation of record on appeal in the above-entitled action and having made application to this Court for an extension of time in which to docket said appeal and file the record thereon, and the Court being advised in the premises, and good cause appearing therefor:

It Is Hereby Ordered that the time in which said Defendant-Appellant, Todd C. Faulkner, may docket his appeal in this cause and file his record on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including October 10, 1951.

Dated at Los Angeles, California, this 24th day of September, 1951.

/s/ BEN HARRISON,

Judge of the United States District Court for the
Southern District of California.

Presented by:

/s/ ROBERT W. FULWIDER,

Attorney for

Defendant-Appellant.

[Endorsed]: Filed September 24, 1951. [18]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is stipulated between the parties, through their respective counsel, that the transcript of the proceedings of May 28, 1951, designated by the defendant-appellant, is to be corrected as follows:

Page 8, line 22, change "attainment" to —payment—.

Page 9, Line 4, after "Looff" insert —(skill games)—.

Page 14, Line 21, change "agree" to—argue—.

Page 15, Line 2, change "reasonable royalties" to —attorneys' fees—.

It is further stipulated that this stipulation is hereby designated and shall become a portion of the record in the instant Appeal.

Dated at Los Angeles, California, this 26th day of September, 1951.

HUEBNER, BEEHLER,
WORREL & HERZIG,

By /s/ ALBERT M. HERZIG,
Attorneys for Plaintiff.

/s/ ROBERT W. FULWIDER,
Attorney for
Defendant-Appellant.

Order

It is so ordered. Date: September 26, 1951.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed September 26, 1951. [16]

In the United States District Court, Southern
District of California, Central Division
No. 5566-Y Civil

Honorable Leon R. Yankwich, Judge Presiding.

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER, Doing Business Under the
Fictitious Name of FAWN,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

HUEBNER, BEEHLER, WORREL &
HERZIG, by

HERBERT A. HUEBNER, Esq., and
WARREN T. JESSUP, Esq.

For the Defendant:

ROBERT W. FULWIDER, Esq.

May 28, 1951. 2:00 P.M.

The Clerk: No. 5566-Y, Gibbs v. Faulkner.

Mr. Huebner: Your Honor, this matter is before you on three subjects. The first is the discharge of David B. Head, as special master, and the fixing of his compensation. That has been hanging a long time, and no disposition was ever brought to your Honor's attention. The second is to ask your Honor to assess damages for the infringement, and the third is to consider some additional allowance as attorneys' fees which have accrued since the date of the interlocutory judgment.

Now, in order to save your Honor's time in the hearing this afternoon we took the deposition of Mr. Gibbs. He is present in court, but we have here his deposition, and I should like at this time to file it, together with the original paper exhibits which accompany the deposition.

The Court: All right.

Mr. Huebner: I will summarize or point out, with your permission, the highlights that we want to bring to your Honor's attention.

Mr. Fulwider: Might I say, your Honor, that there are numerous parts of the deposition which I think could be objected to, but in the interests of co-operating with Mr. Huebner, I will waive those objections as to materiality, with [2*] the opportunity, of course, to discuss the weight to be given. In that deposition there are ten different licensing agreements attached as exhibits, and I would like to at this time, if I may, offer an analysis that I

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

have made here as our Exhibit A, to go with the deposition.

The Court: Let's start out by having all the evidence that is going to be introduced, and the arguments afterwards.

Mr. Fulwider: I was thinking if this could be marked——

The Court: One thing at a time, gentlemen. Let me take care of these things right now. You are offering in conjunction with this hearing on the subject of damages the deposition, and you are waiving all the objections?

Mr. Fulwider: Yes, your Honor.

The Court: All right. The deposition will be received as a proper showing on the subject of damages.

The Clerk: Do you wish that given an exhibit number?

The Court: Yes, you may give it an exhibit number.

The Clerk: That will be Plaintiff's Exhibit A.

The Court: Let me see. There are some papers attached?

Mr. Huebner: There are contracts attached as exhibits.

Mr. Fulwider: They are numbered, I believe, 1 to 10.

The Court: Then call them A-1 to -10, inclusive.

(The documents referred to were marked Plaintiff's Exhibits A and A-1 to A-10, inclusive, and were received in evidence.) [3]

PLAINTIFF'S EXHIBIT A

In the United States District Court, Southern
District of California, Central Division

Civil No. 5566-Y

JOHN T. GIBBS,

Plaintiff-Appellee,

vs.

TODD C. FAULKNER, et al.,

Defendants-Appellants.

DEPOSITION OF JOHN T. GIBBS

the plaintiff herein, called as a witness in his own behalf, on Wednesday, March 28, 1951, at the hour of 11 o'clock a.m. of said day, in the offices of Messrs. Huebner, Beehler, Worrel & Herzig, 410 Story Building, 610 South Broadway, Los Angeles, California, pursuant to oral stipulation of counsel, before C. W. McClain, a Notary Public in and for the County of Los Angeles, State of California.

Appearances:

For Plaintiff-Appellee:

MESSRS, HUEBNER, BEEHLER,
WORREL & HERZIG, by
ALBERT M. HERZIG, ESQ.

For Defendants-Appellants:

ROBERT W. FULWIDER, ESQ.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Mr. Herzig: May the record show that this deposition was continued from a previous date, and is being taken upon stipulation?

Mr. Fulwider: Yes.

Mr. Herzig: Let the record show that the purpose of taking the present deposition of Mr. Gibbs, the plaintiff, is to conserve the time of the court in the hearing upon the question of damages, now set for April 9, 1951, and also on account of the possibility of the absence from the City during said time of the plaintiff, Mr. Gibbs.

JOHN T. GIBBS

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Herzig:

Q. You are the same John T. Gibbs who is the plaintiff in the present action, are you not?

A. Yes.

Q. Mr. Gibbs, will you tell us approximately how many licenses you have had outstanding during the unexpired term of your patent in suit?

A. Would that include the partnerships which I am also interested in as an operator, or just other agreements?

Q. I am referring now just to the agreements, that is, the license agreements.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

A. Eighteen, eighteen or nineteen.

Q. Do you know where those license agreements now are?

A. Well, a number of them I turned over to your office, and some of them are at an attorney's office in New York.

Q. Will you tell us what the general basis was that you used, the various considerations in your mind, when you entered into the various license arrangements, the terms?

A. The terms were generally based upon the number of months the location would operate. There are some locations which have only the summer season, which is two or two and a half months, when the park may be open or the beach may be open for business. Others are 10—8, 9 or 10 or 12 months. Then it is further based upon the potential amount of business that a place can do, according to the size of the city and the location of the business. The basis, generally, for the royalties has been for anything over 2½ to 3 months open, \$3,000 royalty, plus a license agreement for the operation of the equipment, which is usually based upon the number of units which they purchased or leased from me, and also according to the potential location, as to the amount of profit that can be made in that operation.

Q. Now, we have several documents which purport to be license agreements, some of which were

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

referred to in a previous proceeding before Commissioner Head. I hand you what has been marked in that previous proceeding Exhibit 1, and ask if you will identify that?

A. The contract which I have in my hand is one between myself and Kahn's Amusement Corporation, and with T. Z. R. Amusement Corporation.

Mr. Fulwider: Any date on it?

A. June 9, 1936.

Q. (By Mr. Herzig): What type of location is that, Mr. Gibbs?

A. This is located on Coney Island, Brooklyn, New York. The season there is approximately a 5½ to 6 months' season. They have at times operated for 12 months. But the generally accepted season for amusement games is a 5½ or 6 months' season.

Q. What is the number of machines that are located at that place?

A. In this particular location there were 48 machines at one time, and at another time there were 52.

Q. Are they all in the same place?

A. For this one company, yes, they are all in the same place.

Q. Is that an exclusive arrangement, or do you have other licenses at Coney Island?

A. No, it is not an exclusive arrangement. There were two other operations in addition to this one operation.

Q. Whose were the other operations?

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

A. One was Kahn's Amusement Corporation. Another one was operated by a gentleman by the name of Moe Silverman. I don't recall the corporation name.

Q. And both of those latter were also licensed under the same patent in suit?

A. Yes. There were three separate places operating there.

Mr. Herzig: Mr. Reporter, will you mark that document from which Mr. Gibbs testified as Plaintiff's Exhibit 1, in this proceeding?

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 1.)

The Witness: The corporation that Mr. Silverman operated was, as I recall, the M. & R. Amusement Corporation. I believe you have a contract there for them.

Mr. Herzig: Then we will get to it in its turn.

I now ask the reporter to mark as Plaintiff's Exhibit 2 a document which purports to be another license agreement.

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 2.)

Q. (By Mr. Herzig): I will ask you if you will kindly identify that, first as to its date?

A. The 6th day of May, 1946.

Q. Who are the parties to the agreement?

A. John T. Gibbs and Kahn's Amusement Cor-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

poration, with Eddie's Amusement Corporation.

Q. Was that one of the licenses granted under your patent in suit?

A. This is a modification agreement of the T. Z. R. Amusement Corporation, which is Exhibit No. 1.

Q. What is the location licensed in that agreement?

A. That is the location in Coney Island.

Q. The same location?

A. The same location as Exhibit 1.

Q. Was that the same location, from the standpoint of the housing of the unit, or was that the same location only as to Coney Island?

A. It is the same location as to the building and Coney Island.

Q. And the same machines operate under this?

A. The same machines, yes.

Q. What was the purpose of this agreement—

A. The purpose of this agreement—

Q. —in view of the previous existence of the other agreement?

A. —is the modification of the other agreement with T.Z.R. Corporation, wherein T.Z.R. Corporation, through some agreement with one of my other licensees, reduced the original 5 per cent of the gross receipts to a set fee per season, the set fee being \$2,000, in place of the 5 per cent gross, which Exhibit 1 contract calls for.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Mr. Herzig: I have another license agreement, which I will ask the reporter to mark as Exhibit 3.

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 3.)

Q. (By Mr. Herzig): I will hand you what purports to be another license agreement, and will ask you if you will identify that as to date?

A. It is an agreement made the 11th of January, 1947.

Q. And between what parties?

A. Between myself, John T. Gibbs, and Boardwalk Amusement Corporation, of the State of New Jersey.

Q. What type of location is that, Mr. Gibbs?

A. Atlantic City is another seasonal resort, having five or six months of business for this type of amusement. Atlantic City is open the year round, but the games are very seldom open longer than 5½ to 6 months.

Q. What is the number of machines installed in that location? A. 60.

Q. Under the same roof? A. Yes.

Q. Is that an exclusive arrangement?

A. No. There is another operator there.

Q. Also licensed by you? A. Yes.

Mr. Herzig: I ask that this document, which also purports to be a license agreement, be marked Exhibit 4.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 4.)

Q. (By Mr. Herzig): Mr. Gibbs, I will hand you another license agreement, which is marked Exhibit 4, and ask if you will identify Exhibit 4 as to date? A. It is dated April, 1947.

Q. And who are the parties?

A. Between John T. Gibbs and Kahn's Amusement Corporation, with Eddie's Amusement Corporation.

Q. What type of location is that, or what type of location does that refer to?

A. This refers to the same location as was formerly mentioned in Exhibit 1. This is an amended contract with the T.Z.R. Amusement Corporation.

Q. And also at what place?

A. The same place of business, Coney Island.

Q. Does that Exhibit 4 relate to the same place of business? A. Yes.

Q. Under the same roof?

A. The same place, the same roof. These modification agreements are written up every year. You will note that the term of them is only for one year, whereas the T.Z.R. original contract, which is Exhibit 1, was for a longer period of time.

Q. Is Exhibit 4 also a non-exclusive arrangement, like Exhibit 1? A. Yes.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. Were there, at the time of the execution of and for the period mentioned in Exhibit 4, other operations at the same amusement area?

A. Two other operations.

Mr. Herzig: I will ask to have this license agreement marked Exhibit 5.

(Said license agreement was marked Plaintiff-Appellee Exhibit 5.)

Q. (By Mr. Herzig): I now hand you this document, and will ask if you will identify Exhibit 5 as to date, parties and location?

A. The date is the 13th day of May, 1946, between John T. Gibbs and Kahn's Amusement Corporation, with M. & R. Amusement Co., Inc.

Q. What is the nature of the location, the installation?

A. That is another one at Coney Island, on the Boardwalk on Coney Island, Brooklyn, New York.

Q. What is the number of machines installed at that location?

A. There are approximately 50. I don't believe it mentions the number, and I would have to take that from memory.

Q. During what period of the year or portion of the year are these machines mentioned in Exhibit 5 in operation?

A. This is the same location as the T.Z.R. Amusement Corporation. It is the same locality in Coney Island, and the season there is 5½ to 6

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

months. Sometimes the games have stayed open longer than that, and other years they haven't.

Q. Did you give us the number of machines that were in operations at that place?

A. Yes. I said approximately 50—48 or 50.

Q. Was that an exclusive arrangement?

A. No—non-exclusive.

Q. How many other operations were there in that amusement place?

A. There were two others.

Mr. Herzig: I will ask the reporter to mark this other license agreement as Exhibit 6.

(Said license agreement was marked Plaintiff-Appellee Exhibit No. 6.)

Q. (By Mr. Herzig): I hand you this license agreement, or what purports to be another license agreement, and ask you if you will identify that in a similar manner, as to date and parties and location?

A. It was made the 11th of January, 1947, between John T. Gibbs and Philip Albert, of New York City, Borough of Brooklyn, New York City.

Q. What, if you recall, was the purpose of the agreement Exhibit 6?

A. It was a general agreement in settlement of equipment which had already been manufactured by Philip Albert and Associates.

Q. I hand you now another document, which I will ask the reporter to mark as Exhibit 7.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

(Said document was marked Plaintiff-Appellee Exhibit No. 7.)

Q. (By Mr. Herzig): I will ask you to identify Exhibit 7 in a similar manner, as to date and parties?

A. The date is the 10th day of January, 1947, between Kahn's Amusement Corporation, John T. Gibbs, with Julian Levy, of Westfield, New Jersey, and Bernard Forgosh.

Q. What, in general, was this agreement?

A. This was for a small beach in Staten Island, known as South Beach, Staten Island, just a small summer resort, having an operation of about 2½ months.

Q. What is the number of machines located at South Beach, Staten Island, under this agreement?

A. 50 units. I believe they operated fewer than that number.

Q. Was this an exclusive arrangement, or were there other operations, during the term of this agreement?

A. I don't see here any exclusive agreement on it, but I believe it is an exclusive agreement for that territory. The beach itself is such a small beach, and has such a very small crowd there that it wouldn't warrant having more than one.

Mr. Herzig: I will ask to have this agreement marked Exhibit 8.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

(Said agreement was marked Plaintiff-Appellee Exhibit No. 8.)

Q. (By Mr. Herzig): Mr. Gibbs, I hand you next this agreement, and will ask you to identify that?

A. This agreement was made the 21st day of February, 1946, between John T. Gibbs, with Harry Kassel, of Brooklyn, New York, and Mr. Herman Bakerman, of Keansburg, New Jersey.

Q. Is this another license agreement?

A. It is a license arrangement for 48 units, for a small beach in the State of New Jersey, known as Keansburg, New Jersey.

Q. Are there any other operations at that amusement place?

A. There is no other "Fascination" game equipment, my equipment, licensed by me.

Q. None licensed by you?

A. No, none licensed by me. That is another very small park of 2½ months general season.

Mr. Herzig: I will ask to have this agreement marked Exhibit No. 9.

(Said agreement was marked Plaintiff-Appellee Exhibit No. 9.)

Q. (By Mr. Herzig): I hand you what has been marked Exhibit 9, and will ask you to identify this exhibit.

A. This agreement was entered into the 5th day

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

of December, 1940, between John T. Gibbs and William L. O'Brien, Jr., of Revere Beach, Massachusetts.

Q. What are the number of machines operated under that license?

A. The number of machines calling for operation for Revere Beach was 50, but this also mentions two other locations.

Q. Do you recall how many were, in fact, operated under the agreement?

A. 50 were in operation there.

Q. You say there were other operators licensed by you at the same location, at Revere Beach?

A. There was another operation there. This, I believe, is an exclusive license, and, through his license, he had another operation there.

Q. Which was permitted under this agreement?

A. Yes.

Q. As to all these licenses and agreements, Exhibits 1 through 9, which you have just identified, were they all in force and actually operative for the terms that are mentioned in the agreements?

A. Yes, all of them were.

Q. Did you receive the amounts of money that are stated to have been paid in these agreements?

A. Yes.

Q. Were the number of machines that were operated at any of these locations any criteria in determining the terms of these licenses?

A. No. The only basis that the terms were

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

judged upon was mainly the location, as to where they were operated.

Q. Will you explain that?

A. Well, in other words, my contract wasn't based on the amount of units which they put in. It was the type of operation, the length of season which the games could operate in that particular location, the amount of business that was possible in that location.

Mr. Herzig: I will ask to have this so-called compromise agreement marked as Exhibit 10.

(Said compromise agreement was marked Plaintiff-Appellee Exhibit 10.)

Q. (By Mr. Herzig): I now hand you what has been marked Exhibit 10, which purports to be a compromise agreement, relating to a license in the Long Beach, California, area, and ask you if you will identify that?

A. This was made between John T. Gibbs with Arthur Loeff, Margaret Mary Loeff, James Anglemyer, Douglas Wiser and Loretta Cecilia Wiser. They are all operating under the fictitious name, the fictitious firm name of Skill Games, of Long Beach, California. The date of the contract is the 15th day of February, 1946.

Q. Were there some alleged sums stated to be due under that agreement, as called for?

A. All payments were made.

Q. Was that agreement in full force and effect,

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

according to the terms and conditions thereof, during the life of the agreement, as stated therein?

A. Yes.

Q. Does the agreement, Exhibit 10, reflect the true value of that location, in view of your other licensing arrangements?

A. I wouldn't say that it did.

Q. Will you explain that?

A. Well, this agreement was made with Skill Games under rather strained circumstances, in that there were two other games in operation there, and an exclusive could not be granted, in that sense of the word, inasmuch as there were two others, and litigation would have to be involved.

Q. What, if any, other terms and conditions would you have arrived at, in view of your prior experience in licensing under your patent?

Mr. Fulwider: I will object to that. What he might have done I don't think is relevant to this inquiry.

The Witness: I may go on further. I stated at first that this wasn't exactly a normal contract. In the first place, Long Beach itself and its location, and the location of the other games there, were a 12 months' operation, a year's operation, and therefore far more valuable, as far as the license agreement is concerned, than many of my others, which were just in seasonal locations.

Mr. Herzig: Will you read back that answer, Mr. Reporter, please?

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

(The answer was read by the reporter.)

A. (Continuing): Further also, I have other contracts which aren't here. One happens to be with the——

Mr. Fulwider: I will object to his testifying about any contracts that are not here. If he wants to produce them, that is all right.

Q. (By Mr. Herzig): What, if any, discussion did you have leading up to the agreement, Exhibit 10, concerning the fact that the licensees under that contract would not have an exclusive in this Long Beach area?

Mr. Fulwider: I object to any discussion prior to the agreement. I think the agreement speaks for itself. That supersedes all prior negotiations.

Mr. Herzig: I believe you are right, that it does, but I would like to have Mr. Gibbs testify as to any negotiations which might bear upon the question of the value of the Long Beach area.

Mr. Fulwider: I don't think that is proper, in view of the fact that he did arrive at a compromise agreement. You can ask him, if you want to——

Mr. Herzig: Let's take it off the record.

Mr. Fulwider: But I will object at the time.

Mr. Herzig: Off the record.

Mr. Fulwider: Yes.

(Discussion off the record.)

Q. (By Mr. Herzig): Preliminary to the agree-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

ment Exhibit 10, was there any discussion concerning the value of the license, under the conditions under which it was made, that is to say, the presence of the other operators, Hicks, Anderson and Faulkner, referred to therein, and what those conditions would have been if you were able to give Mr. Loeff and other licensees an exclusive in the Long Beach area?

Mr. Herzig: I take it that this question is objected to on grounds which were discussed between counsel off the record, but that, if it is deemed proper, the form of the question is not objected to.

Mr. Fulwider: I was going to say, as to any conversations that he is going to relate, he should lay the proper foundation as to parties present and time and place.

Q. (By Mr. Herzig): Preliminary to the execution of Exhibit 10, were there any meetings between you and the licensees?

A. Several meetings, yes.

Q. When were those meetings held?

A. They were held for a period of two months prior to the agreement.

Q. Where were they held?

A. They were held in Mr. Loeff's office in Long Beach, and also at his patent counsel's office. Mr. Lyon, I believe, is his patent counsel.

Q. Who were present at those meetings?

A. An associate—I don't know whether he is actually an associate—he is not mentioned here—

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

but he was Mr. Looff's manager at Long Beach, Mr. Al Brown, and myself and Mr. Looff were the ones that were mainly discussing it, outside of his attorneys, at a later date.

Q. What, if anything, do you recall of these conversations? What was said?

Mr. Fulwider: I object on the ground of hearsay, as well as materiality.

Mr. Herzig: Off the record.

(Discussion off the record.)

Q. (By Mr. Herzig): Mr. Gibbs, what is your occupation?

A. My occupation is manufacturer of amusement equipment and operating amusement equipment.

Q. What type of amusement equipment?

A. Mostly skill games and "Fascination" equipment.

Q. Is that the same equipment that is described and claimed in the patent in suit?

A. The equipment in the patent in suit is also known as "Fascination Game."

Q. Is the "Fascination Game" the game that you license under your patent in suit?

A. Yes, it is.

Q. How do you operate your business of "Fascination"?

A. There are several phases of the business. There is the licensing of it, and there is manu-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

facturing of the equipment, and also the operation of the equipment itself to the public.

Q. Approximately how many machines, as an estimate, have been operating under licenses of your patent?

A. Approximately 850 to 900 units.

Q. Over how long a period of time?

A. About 20 years.

Q. During all this time have you observed the operation of the machines?

A. I have not only observed the operation, but I have been in the operation myself, as a business, throughout the United States.

Q. And set them up for business?

A. And set them up for business, and also operated them as a business.

Q. And collected the money? A. Yes.

Q. And regulated the operation of the machines?

A. The general operation of the business, yes.

Q. Have you done any traveling in connection with the business of exploiting the "Fascination" game?

A. Yes, throughout the United States.

Q. Where?

A. Well, criss-crossing the country from Massachusetts to Florida, and all up and down the Atlantic Seaboard, the Midwest, the Pacific Coast Area, the Northwest Area, and the Mountain States Area.

Q. Are you familiar with the principal amuse-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

ment places, then, in the United States, in which "Fascination" games have been installed and might be installed?

A. Yes, I am. And I am also a member of the National Association of Amusement Parks, Pools and Beaches, which is an association of amusement parks, park owners, managers, concessionaires, everything pertaining to the general amusement business.

Q. Are you able, on visiting an amusement center, to make an accurate appraisal of the value of that amusement center from the standpoint of its worth in installing "Fascination" games?

A. Yes, I think I am. After all, I do invest my own money in it, and I have to have some ideas as to what a location or park is worth and valued at.

Q. From what standpoint?

A. From the standpoint of returns in business and value, what it is worth as a licensed "Fascination" business or place, for operation.

Q. Judging from this experience, then, what is your estimate of the worth of the Long Beach Area prior to the installation of any "Fascination" games?

A. The Long Beach Amusement Area has always been a good business place for amusement games, in fact, one of the best in the United States. I formerly operated there myself, in 1931. At the present time I am now investing in the neighbor-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

hood of \$50,000 in opening up a location on The Pike in Long Beach.

Q. What were you operating in 1931?

A. "Fascination."

Q. The same game? A. Yes.

Q. As that in suit?

A. Yes. That was the original location of the "Fascination" unit, the original model.

Q. From the standpoint of a license on an exclusive basis in Long Beach, what would be the value of such a license?

Mr. Fulwider: We object, unless you qualify him as an expert, qualify him to give his opinion as an expert. Otherwise his answer is immaterial.

Mr. Herzig: All right, as an expert.

The Witness: Will you repeat that for me, please?

(The question was read by the reporter.)

Q. (By Mr. Herzig): In your opinion?

A. You mean the granting of a license, or someone coming to me and asking what it is worth, or my opinion as to what I would say it was?

Q. What, in your opinion, would be the value of the Long Beach exclusive installation under your patent?

A. An exclusive installation under my patent, it is very difficult to put an exact value on it, because the amount of money that can be made there, what has been made, is so tremendous.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. Be specific, if you can. First try to give us an estimate of what you think it would be worth.

A. I would estimate that it would be worth about \$10,000 a year license fee. To back up that opinion, an associate of mine is paying \$25,000 for a 50 per cent interest.

Mr. Fulwider: We will move to strike that answer as volunteered and not in answer to the question.

Mr. Herzig: We don't object to the answer, and we feel that it is a proper answer.

Q. (By Mr. Herzig): Were you familiar with the location 101 Pike, which Mr. Faulkner, the defendant here, was operating? A. Yes.

Q. When did you first visit it?

A. It was the summer of 1945, I believe.

Q. Thereafter did you visit it any more?

A. Yes, several times.

Q. Approximately how many times?

A. Oh, I would say I dropped in 15 or 20 times, maybe more.

Q. Over what period of time?

A. I would say it was over two or three months. I was living in the East at the time, and I made two trips out here, and it was during the period of those two different trips. The entire term was probably three months.

Q. In 1945?

A. '45 and in '46, I would say, those two years.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. During what time of the day did you visit him?

A. It was both in the afternoon and the evening.

Q. Did you observe the number of machines that were in operation? A. Yes.

Q. Do you recall how many there were?

A. I believe there were 32 at one time. I don't know when the period was. They were only using 16, and it seems that sometimes they were using both sections of 16 units.

Q. Did you note the time of play of each game?

A. Yes.

Q. What was it?

A. They were running at that time approximately 35 games an hour, at times more than that.

Q. Did you note the number of players that were engaged in play? A. Yes.

Q. How many were there?

A. Generally, when they had one side—I refer to it as “side,” 16 units—they had 16 units on each side of the room. And the players, there would be 14 or 15 players to a section.

Q. In general, were there usually vacancies?

A. There were vacant seats, if they were running both sections, in other words, if they were running one section, there were very few vacant seats in that section. When they were running both sides—the sides I recall as both sides—when I saw both sides operating, they were running fairly

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

well to capacity. I would say not more than 20 per cent of the seats were vacant.

Q. And during the rest of the time?

A. The rest of the time, when they had one side operating, they usually had it pretty well to capacity, 13 to 14 units in play, and there were only 16 total units tied together.

Q. From your observations and from your experiences in visiting these games, can you estimate the probable gross receipts—

Mr. Fulwider: We will object to that.

Q. (By Mr. Herzig): —per day of operation at the location 101 The Pike?

Mr. Fulwider: We will object to that. There is no sufficient foundation laid to show that he has adequate knowledge upon which to make such an estimate, and, further, that he is not an expert as to that particular location.

Q. (By Mr. Herzig): As to your previous operation on The Pike, where was that?

A. That was at 103 Pike.

Q. How far is that from the location 101 Pike?

A. Next door.

Q. How many machines did you have operating at that time? A. I believe 24.

Q. Do you have any present recollection of your total receipts at that location?

A. Well, it is a long ways back.

Mr. Fulwider: Do you know what year that was? A. 1931.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. (By Mr. Herzig): For how long a period of time did you operate at that location?

A. I was interested in the business there for about a year and a half.

Q. Did you have personal knowledge of the business from the standpoint of the operations, receipts? A. Yes.

Q. How much of the time did you spend at that location at that time?

A. I gave all my time for the first five or six months of its operation, after that I was operating another location in Ocean Park, California.

Q. Will you describe, in as much detail as you can, your particular duties with respect to the business at 103 Pike?

A. My particular duties were the general running and operation of the business, the collecting of cash, the purchasing of merchandise, the giving out of merchandise, and the general duties of an owner and manager of the business.

Q. Did you have supervision over the payment of bills? A. Yes.

Q. And of the receipts taken in? A. Yes.

Q. And did you receive any profit that was made at that time? A. Yes.

Q. I now direct your attention again to the location at 101 Pike, operated by the defendant, and ask again whether you can estimate the approximate day's receipts of the operation at that address, 101 Pike?

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Mr. Fulwider: We still object to that. There is no sufficient foundation laid to show that he had enough knowledge of the operation at 101, and it is objected to on that ground.

Mr. Herzig: Answer the question, please.

A. In observing the play, it was very simple procedure to find out, in a game of this type, how much money was taken in, and how much is given out as prizes. They had a certain set prize there, and a certain cost per seat.

Q. (By Mr. Herzig): What place are you referring to?

A. At 101 Pike, Mr. Faulkner's location.

Q. Continue, please.

A. At the different visits that I made there, they had two different price schedules. At one time they were charging 10 cents a seat, and when 16 people play they are taking in \$1.60, and at that time they were giving out——

Q. Did you play the game? A. Yes.

Q. How many times?

A. Oh, I must have played it 30 or 40 times.

Q. During the whole period? A. Yes.

Q. That you visited the place? A. Yes.

Q. Did you play it each time you visited it?

A. Not each time, but mostly just observed the operation.

Q. Continue, please.

A. At the time when they were charging 10 cents per seat, per game, to play, they were giving

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

out in the neighborhood, equivalent to \$1 in merchandise or free play, so, therefore, they had a profit on their game of 60 cents a game; and running 35 games an hour, they had approximately \$20 an hour profit from the game operation itself. The profit which I am referring to is the difference between the amount which the game gave out in free plays and merchandise, and the amount which they grossed from the players.

At other times they operated at 20 cents a seat, from which they had a gross of \$3.20 for 16 units, and at that time they gave out \$2 in free plays and merchandise, giving them \$1.20 profit per game. Basing their operation on only having one side of the units playing, or 16 units, instead of both of them, they had a potential profit there of \$20 an hour, at the 10 cent price, and approximately \$40 an hour at the 20 cent price. That profit is what is termed in the amusement business as a gross net or a net gross, in other words, the amount of money which one takes in from the players, and the amount which they give out. Other normal expenses, such as rent, overhead and help, are in addition to that.

Q. Do you have any knowledge of what the rent, overhead and help would be or was at 101 West Pike? Do you have any opinion?

Mr. Fulwider: I object to his opinion. I have a standing objection to all opinions.

A. Well, the number of employees he had there,

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

and I know approximately the amount of rent that he pays or did pay, and I would judge \$60 a day for help, rent and general expenses would be about the average of what anyone would pay operating that same type of business, there or elsewhere.

Q. How would you arrive at the profit to the operator of the machines?

A. The profit of an operation of a game is the amount of cash received, less the amount of free plays or merchandise given out.

Q. What about overhead?

A. And then from that you take your overhead out. The net gross which I referred to earlier is only the amount of money that the game operator has left after he has given out those prizes or premiums or free games.

Q. Will you compare the conditions of business at The Pike at the time you operated at 103 with the conditions of business at 101, when you visited 101?

A. At the time when I visited 101, the general business conditions were far greater, necessarily, and also in Long Beach.

Q. Greater?

A. Business conditions were better and greater at that period, during the last part of the war and shortly after. My operation there was during the height of the so-called depression of 1929.

Q. Would you say that the operations at 101 and

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

at 103, but for this differential, were generally comparable?

Mr. Fulwider: I object to that as calling for a conclusion or opinion.

A. The only way I could answer that is that I do know what business I did in 1931, and I am quite certain it is generally accepted that business conditions generally in 1931 were in no way equivalent to the business conditions of 1945, 1946 and 1947. My observation was during 1946 and 1947, and I am quite certain their profits were far greater than mine in 1931, when I operated in that period of 1931 and 1932, due to general conditions nationally, and knowing that 1931 and 1932 were the great depression years, as against 1945, 1946 and 1947, which were highly profitable to all people in the business.

Mr. Fulwider: I object to all that on the ground that it is hearsay.

Q. (By Mr. Herzig): In giving your comparison of the times during which the respective operations took place, will you relate it specifically to the two locations at 101 and 103, rather than the general business conditions all over the country? In other words, what were the conditions at those times at the two locations in question, at The Pike?

A. Business in 1931 and 1932 was very poor in Long Beach. The city itself increased in population from 140,000 in 1930 to 260,000 in 1948, so, there-

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

fore, they had twice as many people, besides the conditions being greater there for business.

Q. What was the relative opportunity for profit at 101 West Pike and 103 West Pike thereafter, in your opinion?

A. I don't quite follow that.

Mr. Herzig: Will you read him the question?

(The question was read by the reporter.)

A. I would say that business conditions were two or three hundred per cent increased in 1945, 1946 and 1947 over the period of 1931 and 1932.

Mr. Fulwider: I have a continuing objection to this whole line, you understand?

Mr. Herzig: Yes.

Q. (By Mr. Herzig): What was the approximate square footage of the Faulkner establishment at 101 Pike?

Mr. Fulwider: Does he know?

Q. (By Mr. Herzig): If you know?

A. I believe he had a 16 or 18-foot front, and the depth was approximately 70 feet—around 1300 or 1400 square feet.

Q. And at 103, during your operation?

A. 103 was approximately the same area.

Q. Is there any circumstance or condition that you know of that would give one a lesser opportunity for profit at 103, during the time of its operation, than at 101, during its operation?

A. Yes. 101, being a corner location, is naturally

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

known as being a better type of location than one more in the center of the building.

Q. Is it a better location, in your opinion?

A. Yes, definitely it is.

Mr. Herzig: Well, it is 1 o'clock.

Mr. Fulwider: What about lunch?

(Whereupon a recess was taken until 2 p.m. of this date, Wednesday, March 28, 1951.)

(Met pursuant to adjournment at 2 o'clock p.m., Wednesday, March 28, 1951, the same parties being present as before.)

Mr. Herzig: I have a couple more things that I would like to take up with the witness.

JOHN T. GIBBS
recalled, testified further as follows:

Direct Examination
(Continued)

By Mr. Herzig:

Q. Mr. Gibbs, you have testified to what you believe was the hourly profit made by Mr. Faulkner. Will you further estimate, on the basis of your observation and experience, what the monthly profit would have been at that location during the period of its operation?

Mr. Fulwider: The same continuing objection.

A. I would say around \$3,000 a month.

Q. (By Mr. Herzig): And annually?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. It would be \$36,000. That was during the period of the 1945 and part of the 1946 operation, as far as I could judge.

Q. 1945 and 1946? A. Yes.

Q. You testified that Mr. Faulkner had, at the 101 Pike location, 32 machines; is that correct?

A. Yes.

Q. You also testified, did you not, prior to the recess, that you have made or caused to be made "Fascination" machines of a similar type?

A. Yes.

Q. And that you have leased the machines; is that correct? A. Yes.

Q. Will you explain the terms of your lease arrangement?

A. The terms of the lease arrangement on the equipment furnished by me is the cost of the equipment, which is my cost, plus an average profit of \$150 per unit. That total amount would have been the fee for the license arrangement.

Q. In other words, what would be your profit?

A. My profit is in the neighborhood of \$150 a unit, was, during that period, at that time. It is a little greater now.

Q. Solely for the use of the unit, solely for the lease of the unit?

A. That was my profit above my cost of manufacturing the equipment, and which the person leasing it from me paid.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. In other words, what was your net profit from the lease of each machine?

A. \$150 per unit, per machine.

Q. Did you provide machines for every operation authorized by you?

A. In all cases, no. Where there had been litigation and the party with whom I was involved in litigation had manufactured his own equipment, then that equipment, in all the agreements, was turned over to me as part of my settlement, and then I leased that equipment back to them for their operation. In the other operations, wherein I furnished the equipment, all that equipment has been built by me.

Q. In other words, in all cases where you have——

Mr. Fulwider: As long as this is your witness, I think you shouldn't lead him so much.

Mr. Herzig: Off the record.

(Short discussion off the record.)

Q. (By Mr. Herzig): What was the origin of the machines which were used by your licensees, taken as a whole?

A. Part of those I manufactured myself. In the other cases, where litigation was involved, and they had already manufactured their own equipment, then they used their equipment.

Q. What was the disposition of the equipment that was not authorized to be made or used by you?

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

A. That was, in most cases, assigned to me, or, rather, a bill of sale was given to me, and then I leased that equipment back to the parties under a license agreement.

Q. Did you obtain any additional income or profit by virtue of the lease back?

A. Yes, I did.

Q. How much was that?

A. Well, in many particular instances, on my own equipment, which I furnished, I had a profit, as I say, in the neighborhood of \$150 per unit.

Q. Those were on machines authorized by you?

A. Those were on machines authorized by me.

Q. And manufactured by you?

A. And manufactured by me. In the others, wherein litigation was involved, oftentimes there was a set—not a set fee, but an amount they paid me for the license agreement, and so much royalty per year to continue their business.

Q. If you had furnished the defendant Faulkner with his machines, pursuant to a license arrangement with him, what, if anything, would you have profited by supplying the machines?

A. About \$5,000.

Q. Based upon a fair unit profit of what?

A. In the neighborhood of \$150.

Q. What, if you know, have you to date paid out in attorney's fees on account of this litigation?

A. About eleven thousand three hundred and some odd dollars.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. Are additional expenses now being incurred?

A. Yes.

Q. Do you know what proportion of the total paid out by you in attorney's fees was on account of appeal to the District Court and United States Supreme Court?

A. Well, not actually knowing the breakdown of it, I would say approximately 40 per cent of that amount has been in the two appeals.

Q. Do you have any oral agreements?

A. Yes, I have had several oral agreements.

Q. Which were in effect during the life of the patent?

A. Yes.

Q. Please tell us what those are?

A. With the people O'Brien and O'Connell, on which you have one contract there—I don't know which exhibit it is——

Q. Just a moment. Exhibit 9. I show you Exhibit 9. Is that the agreement you refer to?

A. I am referring to the two people that are in this agreement, Mr. William L. O'Brien, Jr.

Q. As licensees under Exhibit 9?

A. He has a partner, an associate, by the name of O'Connell, and I have had five oral agreements with them for operation in Ocean Park, California, for which they paid \$3,000 a season, plus the purchase of 52 units of "Fascination," at \$375 a unit. Also Atlantic City, New Jersey, in which they purchased seventy units, at \$375 per unit, and for which they paid \$3,000 a year royalty. Also Olympic

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Park, New Jersey, which is a small summer resort park, which has approximately a 100-day operation per season, for which they pay \$1,000 a year royalty. Also one at Wildwood, New Jersey, which is also a small summer operation park, for which they pay \$1,000 royalty.

Q. Per year?

A. Per year. And in each case they have purchased equipment from me, on which I should have made a profit of approximately \$150 per unit.

Q. In the Ocean Park location, you mentioned the figure of \$375 per machine? A. Yes.

Q. What portion of that is profit?

A. At that time it was about—I believe the cost on those machines was about \$140.

Q. The individuals you are referring to as your oral licensees are the same individuals referred to in Exhibit 9?

A. Yes, with the addition of Mr. O'Connell.

Q. Are there any other locations in which you have had oral agreements or licenses?

A. I believe with Mr. Sydney Kahn. And we have had one other operation other than the ones in the contracts here. And in several cases, where a licensee has had an agreement on one location, they have worked another location, found another location in the resort, which is operated on the original license agreement, and there has been no further one drawn up.

Q. Do you have any other oral arrangements,

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

which are not licensing arrangements, but in which you participate in profits from the operation?

A. I have a contract, a written contract, with Mr. Fitzsimmons, at Santa Cruz Beach, California, in which he infringed on my equipment.

Q. In what year, please?

A. The agreement, I believe, was signed in 1946.

Q. You say the agreement was signed?

A. Yes. This was a written agreement, which I haven't quite been able to locate yet. I am trying to. I doubt if it is lost. This agreement contains the——

Mr. Fulwider: The agreement is the best evidence. I object.

Mr. Herzig: I think the objection is well taken. If the agreement can be found, and if the agreement is found we will make it available as soon as we find it. Meanwhile, I will ask that the witness proceed in setting forth the terms of the agreement.

A. The terms of the agreement were the payment of \$10,000 for the period prior to the time the contract was signed, or the time he had operated the so-called infringing equipment. And then the agreement calls for a partnership arrangement between myself and Mr. Fitzsimmons, wherein I receive 50 per cent of the net profits of the operation.

Q. Do you recall what the net profits were during the years, which should be specified?

A. There were only 15 units involved. It was a very small operation. As I recall, I received in the neighborhood of twenty-four or twenty-five hundred

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

the first year, and just under two thousand, I think, the past two seasons. The agreement is still in effect, because at the time we signed the agreement, it was for a period, I believe for five years' operation.

Mr. Herzig: Will you read back that last answer, please, Mr. McClain?

(The answer was read by the reporter.)

Q. (By Mr. Herzig): What was the first year that you referred to?

A. It must have been '47.

Q. 1947? A. 1947.

Q. And what were the two subsequent years that you referred to?

A. '48 and '49. I just received a further statement—I think I have the statement home—of the partnership. They sent this down to me for my file. And I think that includes about eleven or twelve hundred dollars.

Mr. Herzig: Off the record, for a moment.

(Short discussion off the record.)

Q. (By Mr. Herzig: Mr. Gibbs, besides the year and a half operation at 103 Pike that we have talked about, have you at any time engaged or undertaken to engage in the business of operating your machines at The Pike, in Long Beach?

A. Yes. I am now engaged in the remodeling of a building and the building of equipment for

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

the Long Beach Area, which address is 100 West Pike, and on which we formed a corporation, capitalized at \$50,000, of which Mr. Sydney Kahn purchased 50 per cent of the corporation stock for \$25,000.

Q. Is that Sydney Kahn in any way connected with Kahn's Amusement Corporation, licensee under Exhibit 1?

A. Yes. He is the president of that corporation.

Q. Has he actually paid in, in cash, the amount you have specified?

A. At the present date he has paid in cash \$20,000. There is still \$5,000 that he will have to put up.

Mr. Herzig: Off the record.

(Short discussion off the record.)

Mr. Herzig: That is all.

Cross-Examination

By Mr. Fulwider:

Q. Mr. Gibbs, of the various games which have been licensed and about which you have spoken, how many of those were made according to drawings of the patent, and how many were made of the type operated by Loeff in Long Beach? In other words, how many used balls like those shown in the patent, and how many used marbles with shooters, like those used by the defendant?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. There is only one other place, and that is in San Francisco.

Q. In San Francisco there is a marble type shooter? A. That I know of, yes.

Q. And Looff in Long Beach?

A. Looff in Long Beach. And then there was another man down there by the name of Hicks, I think, that we won the case on. There may be some other small ones around that I don't know of, but as far as any knowledge I have had, that is the only place, except in San Francisco.

Q. Of these 650 games which you have manufactured yourself, they have all been the ball type, then, and not the marble type?

A. Yes, except a certain portion of the 650, yes. Of the 850, no.

Q. There are at present 200, at least 200, we will say, of the marble type?

A. No. I am in production now on 136 of the marble type at the present time.

Q. How long did the T.Z.R. Corporation operate prior to the date of your agreement, Exhibit 1, of June 9, 1936?

A. They operated part of a season prior to that, was all.

Q. Just one season?

A. Yes. In other words, litigation was on for six or seven months after they opened.

Q. I believe in paragraph 3 of that agreement, Exhibit 1, there was an option arrangement. Did

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

they ever take up the option given them in paragraph 3, wherein they were given the right to pay you——

Mr. Herzig: Do you mind letting him see that?

Mr. Fulwider: Sure (handing document to the witness).

Q. (By Mr. Fulwider): ——in lieu of \$1,250 and 5 per cent, a flat sum of \$3,000?

A. Yes, that option was exercised.

Q. That was, in fact, the basis for that renewal agreement of the Eddie Company, wasn't it, Exhibit 4, that Eddie agreement, Exhibit 4, Eddie being, as I understand, the successor of T.Z.R., which provided for \$2,000 a year royalty, did it? That is correct, isn't it?

A. That's right. There are other considerations not mentioned in the contract.

Q. I believe you testified, as to the T.Z.R.-Eddie operation, that the normal season was 5½ or 6 months, and sometimes they ran 12 months; is that correct?

A. They tried to make a 12 months operation there, but there wasn't the business there.

Q. Did you check up on each year of the agreement to see how many months they operated?

A. Yes, because I also had a company there operating at the same time.

Q. Does Coney Island shut down completely for the winter?

A. Coney Island season is to the Mardi Gras,

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

which is a week after Labor Day. There are some places open sometimes Saturdays and Sundays, depending on the weather. There are many restaurants open. Actually, Coney Island is part of a small city. In other words, people reside around there, and as far as amusements are concerned most of those close down, except that sometimes some of them operate in the winter.

Q. When Eddie's Amusement Corporation took over T.Z.R., did they add any more "Fascination" units to the operation, or did it continue to be about 50?

A. They may have added two—between 48 and 50 at all times.

Q. So you would say an average of 50 would be about right?

A. Yes.

Q. So, after the first year, they operated at two thousand dollars per year royalty?

A. That's true. I can clarify that, if I may.

Q. Yes.

A. You see, T.Z.R. Amusement Corporation, and then Eddie's Amusement Corporation, it seems like they were operating, and formed a new corporation, and they actually operated through Eddie's Amusement Corporation; and also another corporation, which was M. R. Company, Inc., on which they operated two locations. You have an agreement there, which is under \$2,000. So, actually, from the original agreement, they operated two locations there at \$4,000.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. All the same owners?

A. It was all mixed up. There were six or eight of them in it.

Q. This M. R. outfit—that was Exhibit 5?

A. Yes.

Q. Were you in Coney Island in each of the years 1946, 1947, 1948 and 1949?

A. I was there at times. I didn't live there, reside there permanently.

Q. Have you ever operated a concession in Coney Island? A. Yes.

Q. Yourself?

A. Yes, under the corporation of "Fascination, Inc.," and also "Novelty Amusement Corporation."

Q. When was that?

A. That was from 1936 until either 1947 or 1948, at which time I sold my interest. The corporations are still operating at the present time, but I sold my interest in '47 or '48.

Q. How long did the M. R. Amusement Corporation operate "Fascination" games prior to the date of the contract, Exhibit 5?

A. It was a very short time. I doubt if it was longer than a month or so. I don't quite recall. But they had manufactured equipment during the period of the litigation on the T.Z.R. suit. After the T.Z.R. suit, which was won by myself, then this contract was entered into. So they had a very short operation, and I couldn't say whether it was longer than a month, but I doubt it.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. What about Boardwalk, Exhibit 3 — is the Boardwalk Amusement Corporation connected with the M. R. Amusement Corporation, as far as you know?

A. No. Certain stockholders of the T.Z.R. and Eddie's Amusement Corporation are interested in that.

Q. But Boardwalk Amusement Corporation was a separate outfit? A. That is separate.

Q. Referring to Exhibit 3, dated January 11, 1947, approximately how long did the Boardwalk Amusement Corporation operate the game under their license, prior to the date of that license agreement?

A. I believe it was around, almost two seasons, because I know there was litigation on it, because one of the partners, the owners in that, was one of the T.Z.R. people, and we first tried to get him for contempt of court for violating the injunction from the court, for building the equipment, that they operated, I believe, for two seasons during this litigation.

Q. They had 50 units, didn't they?

A. They had 48 at one time, and they increased it to 50.

Q. Did Philip Albert and Herman Rapps ever grant any licenses under the master agreement which you made with them, Exhibit 6?

A. One agreement was made at Lake Pontchartrain, New Orleans.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. On the terms stipulated in this agreement, Exhibit 6?

A. I think it called for \$2,000 for the use of the machines, and a \$1,000 royalty, or something.

Q. That would be in accordance with the schedule set up in Exhibit 6?

A. Yes. Does Exhibit 6 have a schedule according to the months of operation?

Q. I think that calls for \$2,000 down, and from \$1,000 to \$3,000 per year royalty.

A. That's right, yes.

Q. Now referring to Exhibit 7, between you and Julian Levy and Bernard Forgosh, how long had they operated the games in question prior to the date of their contract, January, 1947, at South Beach?

A. They operated part of the season before, which would be '46.

Q. Now referring to Exhibit 8, the agreement with Bakerman and Kassel, can you tell me what the various payments there are for? There was a \$6,500 cash down payment, and there was a \$6,700 payment upon delivery of equipment.

A. Well, it is for payment for granting them a license and furnishing them equipment.

Q. You sold equipment to them, in other words?

A. No, it doesn't call for a sale. It leases equipment.

Q. And they were to own the equipment when the license agreement expired?

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

A. That's right.

Q. When the patent expired?

A. That's right.

Q. Now, referring to Exhibit No. 9, your agreement with O'Brien, did O'Brien continue his license at Dade or Dade Beach, Florida?

A. No; he never actually signed the agreement.

Q. But he never operated down in Florida?

A. No.

Q. How many games did he operate in Massachusetts, or places other than Florida, altogether?

A. He operated, under this agreement, at one location in Revere Beach, Massachusetts.

Q. And how many games did he have there?

A. I believe 50 units. He may have increased it recently. Yes, as a matter of fact it has been increased. It was increased last year. I furnished new equipment last year.

Q. How long had O'Brien been operating this game, game units, prior to his contract with you, dated December 5, 1940?

A. He operated about two months of the season prior to the year he signed the contract.

Q. Did he ever grant any licenses to anybody else to manufacture?

A. No, not to manufacture.

Q. Or to use games?

A. I believe that some of this equipment that was mentioned in this, that he made some kind of

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

an operating agreement with another party in Revere Beach.

Q. How long did Looff operate in Long Beach prior to your agreement with him in 1946 sometime?

A. That was 1946, the 15th day of February, 1946. The only time I saw his operation there was in '45, when I first went out there. He may have operated the year before. I didn't see it. I saw it first in '45, when I started my suit against him.

Q. How many units was Looff operating when you made your agreement with him, Exhibit 10?

A. Looff was operating three sections of 16, and then he just opened another section, or was going to—I don't recall whether it was opened, another section—I believe he had 16 units in it.

Q. He did open that later, didn't he?

A. Yes.

Q. And he had another location, didn't he, on The Pike?

A. That is the one.

Q. That was the fourth bank?

A. Yes, the fourth bank.

Q. When Hicks closed down, did Looff take over his operation?

A. No.

Q. Is the Coney Island amusement center any larger than the Long Beach Pike?

A. It is a great deal larger, yes. The center itself, and the number of rides and all types of games, and so forth, extends up the Boardwalk, possibly extends three or four miles.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. And the number of people that patronize Coney Island in any one day is larger than the number that patronize the Long Beach Pike in any one day?

A. It is considerably more. There is a greater area in the amusement section, and the games—when the main traffic is confined to a smaller area, are found to do better business than where it is spread out.

Q. And they pull from the whole New York Area, don't they? A. Yes.

Q. I believe you mentioned that Faulkner's game on The Pike operated at 10 cents and 20 cents, to your observation. Did you, on any of the days you were there, note that one of the banks was operating for 5 cents per person?

A. I believe I noticed that on later trips. As a matter of fact, I think it was at the time this litigation started. At the time of the first two or three visits of mine, on my first trips there, they were not operating for a nickel then.

Q. They were 10 cents then?

A. They were 10 cents, and I think they were operating at 20 cents a game.

Q. So you don't know what percentage of the years from 1945 to 1950 the games operated at 5, 10 or 20 cents per person?

A. I would say, from my observation—

Q. You can answer that yes or no. You don't know, do you? A. With qualifications, yes.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. The answer is that you don't know, and then you can explain what you think; is that right?

A. The time that I noticed the 5 cents was later on, during the litigation, and I believe it was when the business was away off.

Q. And you visited the place at 101 Pike about 15 or 20 times, you think? A. Yes.

Q. During the years 1945 to 1946?

A. Yes, sir.

Q. Did you visit it during the years 1947, 1948, 1949 or 1950?

A. In 1947, yes. I may have once or twice in 1950.

Q. How often in '47, if you remember?

A. I would say half a dozen times or so.

Q. Do you know what system was followed by Faulkner in determining how many free games were to be given away?

A. At various different times I was down there, as I recall, at the instigation of this suit, there was an adjustment of the games, wherein he put a time clock on, and at that time it would probably vary from the previous free games or merchandise certificates.

Q. How many free games were given the first time you visited the Faulkner place at 101 West Pike?

A. I believe when the 10 cents was operating, it was 10 free plays, and also when the 20 cents was operating, it was also 10 free plays.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. And to whom were those free plays given?

A. The winners of the games.

Q. Were any free plays given to the people when they first came in, before they had played the game?

A. I never received any myself, but I understand they did. They had free game cards, allowed two or three free plays a day, in the afternoon or evening. But I never received any of those myself.

Q. So you wouldn't know how many of those they issued?

A. No, I have no way of knowing how many they issued—only enough to induce people to come in more often and spend more money.

Q. Have you ever examined any of the books and records of Mr. Faulkner as to his operation at 101 West Pike?

A. I saw some books here at one time, in Mr. Herzig's office.

Q. Were they Faulkner's books?

A. I presume they were made up at his request, or something.

Q. What kind of books were they?

A. Well, they were supposed to be books of his receipts and his operations.

Q. Do you remember for what period?

A. As I recall, it would be either 1945 and '46, or '46 and '47, as I recall.

Q. Who brought those books up, do you remember?

A. That I don't know.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Q. Who was here explaining it to you, do you remember that?

Mr. Herzig: That is asking for a fact not in evidence.

A. I really don't know who was here.

Q. (By Mr. Fulwider): A young fellow by the name of Jack?

A. I don't believe those are the books that I mentioned.

Mr. Herzig: Just a minute. I don't understand the materiality of this.

Mr. Fulwider: This is cross-examination.

Mr. Herzig: I instruct you not to answer the last question. I object to the materiality of the same.

Mr. Fulwider: Well, he testified as a so-called expert as to what the defendants would have made. I am just trying to lay the foundation, which wasn't laid before, to find out whether or not he has any real knowledge of what the defendant made or what his expenses were. He testified that he saw some of Faulkner's books here at the office, and that gives him some reason to form an opinion.

The Witness: I said I am not certain——

Mr. Herzig: Just a minute. Have you asked him whether he based his previous estimate or opinion on the alleged books and records of Mr. Faulkner? If he hasn't said that he does, I don't see the materiality of Mr. Faulkner's books and records.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Mr. Fulwider: Well, with that remark of counsel, I would say that it is probably useless to ask him the question at this stage. As far as I know, I don't know of any way that Mr. Faulkner's books could get up in this office legally. Do you?

Mr. Herzig: Am I under oath?

Mr. Fulwider: You don't have to answer, if you don't want to.

Mr. Herzig: I have no objection to any questions that are pertinent as the basis for Mr. Gibbs' opinion. Of course, if these questions are being asked to lay the foundation for impeachment, I will withdraw the instructions, subject to motion to strike.

Q. (By Mr. Fulwider): Let me ask you, Mr. Gibbs: What do you remember of what those books showed for the gross income for the period covered by the books?

A. Whatever books I saw, whatever they were, I wouldn't base any opinion as to the business done on those books.

Q. Do you have any recollection as to what expenses they showed? A. No, I haven't

Q. So you weren't basing your previous estimate as to gross or net on your recollection of the information you obtained from the books here in the office?

A. No. On the contrary, I couldn't feel that that was a true picture of the business, from the records I saw.

Plaintiff's Exhibit A—(Continued)
(Deposition of John T. Gibbs.)

Mr. Fulwider: We will move to strike that.

Q. (By Mr. Fulwider): Your answer is just "No." You didn't really have any real information as to how the Faulkner 101 place operated, did you, as to money in and money out?

A. I had information as to what should have come in and what should have gone out, but I don't know what actually happened to it, and I have no way of finding out.

Q. What information was this that you had?

A. By counting the number of players playing the game and the amount of merchandise they gave out.

Q. And from whom did you get that information as to the number of players?

A. By counting them myself.

Q. At times you were there? A. Yes.

Q. And from whom did you get the information about the expenses?

A. The information of one who is accustomed in this business to note the number of employees, and the average amount of players.

Q. So that is a mere guess, as to how the business was operated?

A. I think it is a little more than a guess.

Q. Based on your own experience?

A. Based on experience in operations throughout the United States. We have an average salary that we pay clerks, and the only place that varies a great deal is with your manager.

Plaintiff's Exhibit A—(Continued)

(Deposition of John T. Gibbs.)

Q. And the free games that you mentioned a while ago that the winners got—— A. Yes.

Q. Those were tokens of some kind, that were given the player, that he could use in lieu of money for playing games?

A. That was given as a consideration of winning, which one can either get merchandise for, if they have any merchandise down there to give, or else they are used the same as money and played back, so it represents 10 cents, if it is a 10-cent game, or 20 cents, if it is a 20-cent game.

Q. Approximately when was it that you went over those books here of Faulkner's? What year was it, do you remember?

A. I don't know. I think you possibly can clear that up, because I believe it was—as I recall what that consisted of was a report sheet, or something, that you sent in. I don't know where they came from. Whatever ones I am referring to, it is something that I don't know whether they were actually books, but they were a summary of the year's business. I thought they were in your files or something you could supply to us on our request. I don't know.

Mr. Fulwider: That is all.

(It was stipulated by and between counsel that the witness may read over, correct and sign the foregoing deposition before any Notary Public.)

/s/ JOHN T. GIBBS.

Plaintiff's Exhibit A—(Continued)

Subscribed and sworn to before me this 23rd day of May, 1951.

[Seal] /s/ MARGARET BARNEY,
Notary Public in and for the County of Los
Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, C. W. McClain, do hereby certify that I am a Notary Public in and for the County of Los Angeles, State of California, and that the witness in the foregoing deposition named, John T. Gibbs, was by me duly sworn to testify the truth, the whole truth and nothing but the truth in the above-entitled cause; that said deposition was taken pursuant to oral stipulation of counsel, commencing at 11 o'clock a.m. on Wednesday, March 28, 1951, at the office of Messrs. Huebner, Beehler, Worrel & Herzig, 410 Story Building, 610 South Broadway, Los Angeles, California, and was completed on the same day; that said deposition was written down in shorthand writing by me, and was thereafter transcribed into typewriting under my immediate supervision, and that the foregoing 58 pages contain a true and correct transcription of my shorthand notes so taken.

I further certify that it was stipulated by and between counsel that the witness named in the foregoing deposition may read over, correct and sign his said deposition before any Notary Public.

I further certify that I am not connected by blood or marriage with either of the parties, nor interested, directly or indirectly, in the matter in controversy.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office, this 2nd day of April, 1951.

[Seal] /s/ C. W. McCLAIN,
Notary Public in and for the County of Los
Angeles, State of California.

Received May 28, 1951.

Mr. Huebner: I next offer in evidence the deposition of Todd C. Faulkner, taken on February 5, 1948.

Mr. Fulwider: And may I say at this time——

The Court: Is there anything else you want to offer?

Mr. Huebner: Those are all the papers.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: That is Plaintiff's Exhibit B.

(The document referred to was marked Plaintiff's Exhibit B, and was received in evidence.)

PLAINTIFF'S EXHIBIT B

In the District Court of the United States
Southern District of California,
Central Division
No. 5566-Y Civil

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER, et al.,

Defendants.

Deposition of Todd C. Faulkner, taken on behalf of the plaintiff, at 410 Walter P. Story Building, 610 South Broadway, Los Angeles 14, California, on Thursday, February 5, 1948, at 1:30 p.m., before Byron Oyler, a notary public within and for the County of Los Angeles and the State of California, pursuant to notice and subpoena attached to the deposition.

Appearances of Counsel:

For the Plaintiff:

HUEBNER, MALTBY & BEEHLER, By
ALBERT M. HERZIG, ESQ.

For the Defendants:

ROBERT W. FULWIDER, ESQ.

Plaintiff's Exhibit B—(Continued)

TODD C. FAULKNER

one of the defendants herein, called as a witness on behalf of the plaintiff, having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Herzig:

Q. Mr. Faulkner, you are the Todd C. Faulkner that is one of the defendants in the case of Gibbs versus Faulkner, No. 5566-Y in the District Court of the United States, Southern District of California, Central Division, and in which suit this deposition is being taken as a portion of the accounting proceedings? A. Yes.

Q. You have sat here and listened to the testimony of the two preceding witnesses, Mae Haws and Helen Fouch, to the effect that the day's receipts of the Fawn games are handed over in toto from an apron in which they are received to you, among others, at the end of the day?

A. They never hand them to me. They are dropped in a little box. I never see them. Let this Hilda clear it up. I never see those receipts. I never pay any attention to the money. Even if it was really some money, I still wouldn't want to receive it. I want it to go out that way and have them take care of it that way. They never hand me any of those receipts. If they ever have, I don't remember. They are dropped in the mail box.

Plaintiff's Exhibit B—(Continued)
(Deposition of Todd C. Faulkner.)

Q. What mail box? A. At our home.

Q. By whom?

A. By whoever happens to be checking.

Q. By the checker?

A. Either that or like this Kid Holcomb, he gave me a big sales talk, that he was a good manager, so he went on as night manager for a while.

Q. It is your testimony, I take it, that you never—— A. No.

Q. ——received the cash receipts at the end of the day or at the end of any shift or at any time from the Fawn games, is that your testimony?

A. You see, they bring them out at night and they put them in the mail box. I never go down there. I don't remember even when I was around the place.

Q. It is your testimony you never have received the day's receipts?

A. I wouldn't say that. They might have handed it to me, but I sure don't remember it. If I did I probably would have taken it and laid it down somewhere else, or put it where I thought Hilda would take care of it. She checks the money.

Q. Who takes the money out of the mail box?

A. To tell the truth, I couldn't even tell you. Ask Hilda Potter those things. She will give it to you, I am sure.

Q. Whose mail box is it?

A. It is the mail box of my wife's home where I live.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. What is the address? A. 2255 Cerritos.

Q. What kind of a mail box is it?

A. I don't know. You just drop it in there, and there it is.

Q. Is it a mail box that opens into the house?

A. Yes. It opens into the house.

Q. Does it have a door on the front that you pull out, disclosing a drawer in which you can place the mail or other matter?

A. To tell the truth, I don't know. It is a mail box that opens into the house. I know that is where we get our mail.

Q. You can then reach into the mail box from within the house, without opening the door and obtain the mail, is that right?

A. From the outside?

Q. From the inside of the house?

A. You reach in and get your letters out or whatever is there.

Q. Can you reach into the box from the outside and open the mail that was put into it?

A. I don't know. I never tried. I never paid any attention to it.

Q. Do you regularly reside at the address you just gave? A. Yes, pretty regularly.

Q. When are you ordinarily there?

A. There is no way of saying. I come and go all the time. I might be there or I might not. I just go from one place to another.

Q. Who resides there with you?

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

A. My wife and our two sons.

Q. Does Hilda Potter reside there?

A. No, but her office is there.

Q. Her office is there?

A. Her office is in the home.

Q. When is she there?

A. Oh, she is liable to be there at any time. If my wife and I are gone for a few days, she sleeps there. I don't know what time she comes in. She is there early and late all the time.

Q. Does she sleep there?

A. No, she has a place of her own.

Q. On the premises?

A. No. I don't know where she lives.

Q. Does she have free access to your house?

A. Yes.

Q. Whether you are home or not?

A. She has a key to the front door. She is our trusted employee. I would trust her as much as I would trust anyone.

Q. Has she been instructed by you at any time to take the cash which is deposited, I understand, in the mail box, out of the mail box?

A. Oh, yes. I told her when she started to do it and that has been the routine ever since.

Q. Has she always been instructed to keep records of what came in?

A. She went through the Frank A. Crawford office as a competent bookkeeper that could do anything they had. I know nothing about books. I

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

have never seen her books. I have looked at figures, but I don't understand books. The different C.P.A.'s and the different people we have had check them, or that I have had, tell me about different systems or something—they say she is a competent bookkeeper.

Q. What does she do with the money after it is received? A. After she receives it?

Q. Yes.

A. She counts it and checks it with a slip that I got. I think Mr. Loeff told me how to put that check system after Mae told me about this guy, you know, possibly not putting in all of the money. I asked Mr. Loeff about it——

Q. Pardon me, who is this guy?

A. Herman.

Q. Who is Mae?

A. This girl who was in here.

Q. Mae Haws? A. Yes.

Q. All right.

A. So I put a check system on, and we checked them. Hilda has everything — to check by. We check their receipts and it is a double check on them every day.

Q. What does she do with the money after she has checked it and recorded it?

A. She takes it up and puts it in the bank.

Q. In whose name?

A. T. C. Faulkner or Todd C. Faulkner, I think.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. Is there any one authorized to draw checks against your account besides yourself?

A. No. I think—I am sure since this trip to Chicago we spoke of before, something happened later on and I couldn't sign payroll checks and I signed power of attorney so that my wife could make up the payroll.

Q. Aside from that period, did you sign all of the payroll and other checks yourself?

A. I wouldn't say I did half of it. I tried to be around—to do a little bit, but I don't pay any more attention to it, only when they call me.

Q. Who pays the payroll checks besides yourself, and other expenses of the business?

A. Mrs. Potter makes them up and I sign them myself.

Q. She makes up the checks?

A. Yes. You see, I can't write to speak of. She makes them out and I sign them.

Q. Do you know what the expenses of your business are?

A. She can tell you all of that.

Q. But do you know?

A. I know I am overdrawn all the time.

Q. You can't keep even?

A. I don't really know. She can give you that information. She knows and she can give it to you in a business-like way. This fellow gets so much and that fellow gets so much, and this gal gets so much,

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

but I might be wrong. I think I could tell you pretty well.

Q. You could tell pretty well what they get?

A. Yes. I have an idea but yet it could be wrong.

Q. What about the expenses of the business?

A. She has all of that, all of the bills.

Q. Do you know what they are? Do you know what you pay for rent there, or do you pay rent?

A. Yes, we pay rent. I think it is on a flat with a guarantee, and we pay the utilities.

Q. What is the flat?

A. I think it is four.

Q. You mean \$400.00?

A. Yes, and the lights and utilities come to around \$35.00 or \$50.00 I think.

Q. What is the total payroll?

A. That I don't know. You will have to check that.

Q. Have you any idea what it comes to?

A. No. I wouldn't say. She knows.

Q. We are not asking for an accurate statement. We just want some idea from you.

A. Well, I don't even know how many people are around there, Mr. Herzig.

Q. I see.

A. I heard one say four and the other one say six. I don't know who is working there or who isn't.

Mr. Fulwider: I think the number of employees

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

varies from time to time and from shift to shift, depending on how business is.

Q. (By Mr. Herzig): Does Hilda Potter take the money that she receives in the mail box and deposit it anywhere else than in your checking account?

A. No. I am sure she does not. She deposits it daily, or if we don't get any, she deposits it when we get enough to deposit.

Q. Is there any source of revenue or funds that are deposited in the mail box and handled in a similar manner from the same or other enterprises by Hilda Potter? A. I don't know.

Q. You don't know whether the income from your other businesses are deposited in your checking account or not?

Mr. Fulwider: That is not the question. First you said the mail box, and now you say other accounts.

Q. (By Mr. Herzig): All right, the mail box.

A. I think there are other employees that have keys to the front door.

Q. Does any of the revenue from your other businesses, if any, or from any other source, find its way into that mail box?

A. I don't know. That is very sincere. I don't know.

Q. Mrs. Potter can tell us?

A. You can phone her and she will tell you over the phone. There is no secret.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. She is not a witness at the moment, Mr. Faulkner, you are the witness, and we only want what you know, not what she knows or might know.

A. I don't know.

Q. We want it to the best of your ability, please.

A. I don't know.

Q. Do you know what other sources of revenue are deposited in your checking account than those from the Fawn game?

A. From other businesses? My other businesses are my own business. Are they in question in this thing?

Q. That is not the point, Mr. Faulkner.

A. I am talking to my attorney now. I am not talking to you. There was an issue brought up in Court. I am not much of a fellow to know whether it is legally right or wrong, but I want to ask my attorney because I heard some things up there and I heard them say things that I didn't think was just right.

Mr. Fulwider: I think Mr. Herzig wants to know whether or not the moneys from your various businesses go into your same bank account. Is that right?

Q. (By Mr. Herzig): That is all I am trying to get at.

A. I feel sure that they do, but Mrs. Potter can tell you that. I suppose she can go right down the line on that.

Q. Mr. Faulkner, I am sorry, but you are a wit-

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

ness in a court of law of the District Court of the United States and this is no joke.

A. Am I treating it as a joke?

Q. I am not going to say what I think, but it strikes me that every time I ask you a question which you think is pertinent, you suggest that I ask someone else. But I am not asking anyone else at the moment. I am asking you. It is up to you as a witness in this case, and as a defendant in this case, to answer the questions to the best of your ability.

A. I am doing that.

Mr. Fulwider: I want the record to show that Mr. Herzig is making remarks that I think are improper and in a manner which I think are improper and wholly uncalled for. If he will ask his questions carefully and clearly, Mr. Faulkner will answer them. He has done nothing today but try to be helpful.

The Witness: Mr. Herzig told me he wasn't going to question me. I told him that I wasn't familiar with this procedure and didn't know anything about it.

Mr. Herzig: I will confess in the record right now that I am slightly angered by what I recall as Mr. Faulkner's testimony about being able to tell roughly what the condition was and what different employees were getting and then being unable to tell me how many employees he has or unable to tell me where the funds go or anything like that.

Mr. Fulwider: I again cite the remarks of coun-

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

sel as uncalled for. Now, Mr. Faulkner answer the questions to the best of your ability and volunteer nothing.

The Witness: Yes, sir.

Mr. Fulwider: If you don't know, say you don't know.

The Witness: Yes, sir.

Mr. Fulwider: If the question cannot be answered yes or no you may say so.

Mr. Herzig: Will you read back the last question and answer concerning the source of funds in the mail box?

The Witness: Would you excuse me for one minute.

(Portion of the record read and a short recess was taken at this point.)

The Witness: You owe me an apology.

Mr. Herzig: I will apologize to any extent necessary to show you that I am in good faith.

The Witness: That is perfectly all right.

Mr. Herzig: All I want are the facts.

The Witness: But I am not going to say something like the woman said. I do know this, and I can tell you what one or two of the people get.

Mr. Fulwider: Now, just let counsel ask the questions and you answer them the best you can. If you don't understand a question say so. If you don't remember say so. Let's get out of here.

The Witness: O.K.

Plaintiff's Exhibit B—(Continued)**(Deposition of Todd C. Faulkner.)**

Q. (By Mr. Herzig): I will put my question this way. Are there any others? A. Yes.

Q. Are they deposited there by Hilda Potter?

A. Yes.

Q. Does anyone else deposit there but Hilda Potter?

A. My wife and sometimes me and sometimes both of them. My wife and I do, I am sure.

Q. Sometimes your wife and you, from the Fawn game or from other games?

A. Sometimes we bank together.

Q. Have you ever deposited the funds from the Fawn game in your checking account?

A. Isn't that what we are saying we are doing? I don't understand. I take the receipts—if I go, they make them up and I grab the bag with the money and throw it in the bank, and while the guy, while the cashier is counting it, I run down to the end and ask the girl what my balance is, and then I run over to the escrow department and ask her something, and then I go back and the fellow says, "You are eighteen cents short," and I give him eighteen cents, or I am a dime over, and that is the way we operate. I don't go to the bank so much myself although I wish I could go every day.

Q. Is this bank of which you speak the only bank account where funds from the Fawn game are deposited?

A. To my knowledge I just have one account.

Plaintiff's Exhibit B—(Continued)

(Deposition of Todd C. Faulkner.)

Q. In what bank is this particular account of which you speak?

A. It is the Western Bank of Long Beach.

Q. What address is that?

A. All I know is Western Bank of Long Beach.

Mr. Fulwider: What street is it on?

The Witness: I don't know, Bob.

Q. (By Mr. Herzig): Do they have more than one bank?

A. There is only one bank. That will get it.

Mr. Fulwider: It is an independent bank.

Q. (By Mr. Herzig): How long have you had your account there, Mr. Faulkner?

A. I don't know. I had it there and I moved it to the Bank of America, and then I moved it back again.

Q. Has it been there for the length of time that you have operated the Fawn games?

A. No, I think about six months—I will have to bring the book in.

Q. How long was it at the Bank of America?

A. You will have to ask her, I don't know.

Q. Were there any other banks you banked with besides the Bank of America and the bank in Long Beach that you have mentioned?

A. No. I think that is all.

Q. What is the address of the Bank of America?

A. I think it is at Fourth and American. It might be Third. It is either Third or Fourth. It is across from the Post Office, so I believe that would be Third.

Plaintiff's Exhibit B—(Continued)
(Deposition of Todd C. Faulkner.)

Mr. Herzig: If we can get Mrs. Potter here and get the books in probably we could find out whether it included this or didn't include it.

(Discussion in re continued hearing and production of books and records, and by Stipulation the matter was continued to the hour of 10:30 p.m., March 3, 1948, at which time counsel would go over the books and records prior to calling the Notary and Reporter, and that upon the conclusion of a preliminary survey they would start taking the depositions at perhaps 1:30 o'clock p.m., March 3, 1948, at the same place.)

/s/ TODD C. FAULKNER,
Witness.

State of California,
County of Los Angeles—ss.

Subscribed and sworn to before me this 23rd day of April, 1948.

[Seal] /s/ ODETTE B. LANDIS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 17. 1951.

Plaintiff's Exhibit B—(Continued)

State of California,
County of Los Angeles—ss.

I, Byron Oyler, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition, Todd C. Faulkner, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place herein named, and thereafter reduced to typewriting under my direction.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 24th day of February, 1948.

[Seal] /s/ BYRON OYLER,
Notary Public in and for the County of Los Angeles, State of California.

Received May 28, 1951.

The Court: What is this paper just filed, "Statement of Defendant on Accounting"?

Mr. Fulwider: That is a statement similar to a former one filed with Mr. Head, as a preliminary to the accounting, so I thought, to complete the record, I would prepare a similar summary show-

ing gross business and expenses for the period following the previous one.

The Court: All right.

The Clerk: Just a moment. Is this received?

Mr. Fulwider: That would be our No. 1, if they are going to use letters.

The Clerk: Is this analysis admitted? That will be Defendant's Exhibit 1 on hearing.

The Court: Yes. [4]

(The document referred to was marked Defendant's Exhibit 1, and was received in evidence.)

DEFENDANT'S EXHIBIT No. 1

Analysis of Gibbs License Agreements

Exhibit 1

Dated: June 9, 1936

Licensee: T.Z.R. Amusement Corp.

Location: Coney Island, New York.

Annual Royalty:

First year's license plus past infringement of approximately 1 year: \$2,250.00 plus 5%, or \$4,000.00 (for 2 years, i.e., \$2,000.00 per year).

Thereafter: 5% of gross with no minimum guarantee.

No. of Game Units: 50

Annual Royalty per Game Unit: \$40.00.

Defendant's Exhibit No. 1—(Continued)

Exhibits 2 and 4

Dated: May 6, 1946 and April, 1947.

Licensee: Eddie's Amusement Corp., successor to T.Z.R. Amusement Corporation.

Location: Coney Island, New York (same as Exhibit 1).

Annual Royalty: \$2,000.00.

No. of Game Units: 50.

Annual Royalty per Game Unit: \$40.00.

Exhibit 3

Dated: January 11, 1947.

Licensee: Boardwalk Amusement Corp.

Location: Atlantic City, New Jersey.

Annual Royalty: \$2,550.00.

No. of Game Units: 60.

Annual Royalty per Game Unit: \$42.50.

Note: Total royalty paid for three year's license plus 2 years past infringement or a total of 5 year's operations was \$12,750.00, or an average of \$2,550.00 per year.

Exhibit 5

Dated: May 13, 1946.

Licensee: M. R. Amusement Co., Inc.

Location: Coney Island, New York.

Annual Royalty: \$2,000.00.

No. of Game Units: 50.

Annual Royalty per Game Unit: \$40.00.

Defendant's Exhibit No. 1—(Continued)

Exhibit 6

Dated: January 11, 1947.

Licensee: Philip Albert and Herman Rapp.

Location: General agreement for operations in any location not already licensed. Agreement contemplated sub-licensing other operators.

Annual Royalty: Uncertain. Provides for \$2,000.00 down payment plus annual royalty between \$1,000.00 and \$3,000.00.

No. of Game Units: 50.

Annual Royalty per Game Unit: Uncertain. Probably a little more than \$40.00 per unit.

Notes:

(1) Gibbs agreed to supply units at cost.

(2) Only one sub-license granted under this master agreement, and no evidence in record of its terms.

Exhibit 7

Dated: January 10, 1947.

Licensee: Levy and Forgosch.

Location: South Beach, Staten Island, New York.

Annual Royalty: \$1,000.00.

No. of Game Units: 50.

Annual Royalty per Game Unit: \$20.00.

Note: A total royalty of \$4,000.00 was paid

Defendant's Exhibit No. 1—(Continued)

for three year license plus approximately one season of past infringement, i.e., \$4,000.00 for 4 years, or \$1,000.00 per year.

Exhibit 8

Dated: February 21, 1946.

Licensee: Bakerman and Kassel.

Location: Keansburg (Beach), New Jersey.

Annual Royalty: \$1,376.00.

No. of Game Units: 48.

Annual Royalty per Game Unit: \$29.00.

Notes:

(1) Total royalty paid for 5 years was \$6,880.00.

(2) Licensee paid \$13,200.00 for the purchase of 48 game units, i.e., \$277.00 per unit.

Exhibit 9

Dated: December 5, 1940.

Licensee: W. L. O'Brien.

Location: (a) Revere Beach and most of balance of Massachusetts.

(b) Hampton Beach, New Hampshire.

(c) Old Orchard Beach, Maine.

(d) Dade County, Florida.

Note: Never operated in Dade County.

Annual Royalty: \$3,600.00.

Defendant's Exhibit No. 1—(Continued)

No. of Game Units: 100.

Annual Royalty per Game Unit: \$36.00.

Notes:

(1) Paid total royalty of \$36,000.00 for 9 years license plus 1 year's past infringement, i.e., for 10 years' operations.

(2) Licensee could operate total of 3 games of 50 or more units each in New England, i.e., a minimum of 150 units for his \$3,600.00 per year, making a per unit royalty of \$24.00. However, Gibbs testified O'Brien only operated 100 units, so we have used that figure in computing the per unit average of \$36.00.

Exhibit 10

Dated: July 25, 1946.

Licensee: Arthur Loof et al, d.b.a. Skill Games.

Location: Long Beach, California (exclusive).

Annual Royalty: \$2,417.00 (Total Paid for 6 years was \$14,500.00).

No. of Game Units Operated by Loof: 64
(But could operate as many as desired with no increase in royalty).

Annual Royalty per Game Unit: \$40.30.

Notes:

1. Loof paid (See Paragraph 5) \$10,000.00 on signing agreement, of which \$1,500.00 was earmarked for future suit costs, leaving \$8,-

Defendant's Exhibit No. 1—(Continued)

500.00 total royalty for 2 years past infringement plus 2 years license, i.e., from May 1, 1944 to May 1, 1948. He also paid \$6,000.00 for 2 more years licensing from May 1, 1948 to May 1, 1950, i.e., at the rate of \$3,000.00 per year.

2. If we take \$3,000.00/yr. as total annual royalty, the game unit royalty for 64 units is \$47.00 per game unit.

3. Gibbs agreed (See Paragraph 6) to sue Faulkner and others and Loof paid first \$5,000.00 of suit costs, and shared 50% of costs thereafter. Net suit costs to Gibbs were therefor only 50% of excess over \$5,000.00.

4. Loof had right (See Paragraph 2) to manufacture all game units he needed for his own use.

Summaries

A. Average Unit Royalties for Large Eastern Operators:

Coney Island	\$ 40.00 per unit
Atlantic City	42.50 per unit
New England Beaches....	41.00 per unit

\$123.50

Average for the three areas: \$41.20 per game unit.

Long Beach, California: \$40.30 per game unit.

Average for all large operations: \$40.75 per game unit.

Defendant's Exhibit No. 1—(Continued)

B. Average For Small Eastern Beaches:

South Beach	\$20.00
Keansburg	\$29.00
	<u>\$24.50</u>

C. Average of all Operations:

Large Eastern Beaches.....	\$ 41.20
Small Eastern Beaches.....	\$ 24.50
Long Beach, Calif.....	\$ 40.30
	<u>\$106.00</u>

Average for all operations: \$35.33 per unit.

Computation of Damages
Based on Established Royalty

Faulkner operated a total of 6 years, i.e., from July, 1944 to May, 1950. During most of this time he had 32 game units available for play, although most of the time only 16 were actually in operation.

Using average unit royalty for all large operations, (See Summary A) as the measure of damage, Faulkner's royalties would have been:

32x40.75 or \$1,304.00 per year.

For six years it would be \$7,824.00 total.

Using as the measure, the average of all Gibbs operations, large and small (See Summary C), Faulkner's royalties would have been:

32x35.33 or \$1,130.56 per year.

and for six years, \$6,783.36 total.

Defendant's Exhibit No. 1—(Continued)

If Faulkner had paid same rate as Loof in Long Beach, his royalties would have been :

32x40.30 or \$1,289.60 per year.
and for six years, \$7,737.60.

Received May 28, 1951.

Mr. Huebner: Now, your Honor, there was filed on April 26, 1951, a stipulation entitled, "Stipulated Facts." I believe that should be made a part of this hearing and, therefore, I think the original stipulation which is in the files should be marked.

The Court: All right.

The Clerk: Plaintiff's Exhibit C in evidence.

(The document referred to was marked Plaintiff's Exhibit C, and was received in evidence.)

PLAINTIFF'S EXHIBIT C

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 5566-Y

JOHN T. GIBBS,

Plaintiff,

vs.

TODD C. FAULKNER,

Defendant.

STIPULATED FACTS.

Upon defendant's representation as to the truth thereof, the parties to the above-entitled action hereby stipulate to the following facts concerning the operation by defendant of the Fawn games which have been found by the Court to infringe the plaintiff's patent in suit:

1. The first Fawn game comprising sixteen individual game units was installed and was first operated by defendant at 101 West Pike, Long Beach, California, during the month of July, 1944.

2. In August or September, 1944, a second Fawn game also comprising sixteen units was installed and started operating at 101 West Pike, Long Beach, California.

3. Both of said Fawn games continued to operate except for temporary shutdowns for repairs until July 1, 1947, at which time one of said games was moved to a location in the City of Compton.

4. Defendant operated said one Fawn game in Compton from approximately July 1, 1947 to November 1, 1947 on which date said game was moved back to 101 West Pike, Long Beach, California, and both games were thereafter operated at said location until after the expiration of said patent in suit. During the time that said Compton game was operating, only one Fawn game of sixteen units was being operated in Long Beach by defendant, i.e., the defendant continuously operated two, but never more than two Fawn games from approximately August, 1944 to December, 1949.

5. The games operated by defendant in Long Beach and Compton were usually open to the public from approximately twelve noon to 11:00 p.m. of each day, except on days when business was particularly bad due to lack of play and said games were therefore open during a smaller portion of the day.

Dated at Los Angeles, California, this 23d day of April, 1951.

HUEBNER, BEEHLER,
WORREL & HERZIG,

By /s/ ALBERT HERZIG,
Attorneys for Plaintiff.

/s/ ROBERT W. FULWIDER,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 26, 1951.

Received May 28, 1951.

Mr. Huebner: It recites the number of infringing machines that were operated, and the period during which they were operated.

The Clerk: What date was that filed?

Mr. Huebner: It was filed April 26, 1951.

Mr. Fulwider: With Mr. Huebner's permission, I find there is an error on page 2 of that statement of Facts, in the latter part of paragraph 4, appearing on page 2, where it recites that the defendant operated these games down to the expiration of the patent, which was May of 1950. I have subsequently recalled that when the decree or the mandate from the Supreme Court came down in December of 1949, the defendant then shut down his operation, so if in line 8 of page 2 it can be changed to "December, 1949," instead of [5] "the expiration of said patent," that will correctly state the facts.

The Clerk: Shall counsel do that now, your Honor?

The Court: Yes.

Mr. Fulwider: Is that all right, Mr. Huebner?

Mr. Huebner: Yes, that is. On your representation, we accept that as a fact.

Mr. Fulwider: I know that of my own knowledge.

The Court: All right.

Mr. Huebner: Your Honor, while that is being done, I might point out that by this statement of Facts it appears that the defendant Faulkner operated one game beginning in July of 1944. That game consisted of 16 units. In August of that same year he installed an additional bank of 16 units.

So, let us say from late summer of 1944 down to the end of December, 1950, the two banks of 32 units were in continuous operation either on the Pike at Long Beach, or for a few months he had one of them over in Compton. But for the purpose of this hearing, I think it could be properly assumed that both banks of machines were in continuous use for a period—I had it figured out as five years and ten months, but with that correction Mr. Fulwider made, it would be a little less than that. It would be five and one-half years the infringement continued.

Now, if I may point out a few of the highlights in [6] Mr. Gibbs' testimony. He had 18 or 19 license agreements outstanding during the unexpired term of the patent in suit.

This is a sort of a summary of his deposition, of the things we went into. The terms were generally based upon the number of months the location would operate. There are some locations which have only the summer season, which is two or two and a half months. Others are eight, nine, ten, or twelve months. Further, he considered, when he granted these licenses, the potential amount of business that a place can do, according to the size of the city and the location of the business. The basis, generally, for the royalties in the contracts which have been put into evidence shows for anything that operated over two and one-half to three months a \$3,000-a-year royalty, plus the charge Mr. Gibbs made for installing the machines.

It was his custom to manufacture and install the

machines, and he realized a profit on each unit of \$150. Therefore, he had a potential profit of \$150 times 32 in the Faulkner operation. In addition to that, he would have received under the average type of agreement that he had in the ordinary locations \$3,000-a-year royalty. Over a period of five and one-half years that would be—I have to refigure it again in view of your change—that royalty that he lost on that theory would have been \$16,500, approximately \$16,500. So that if you were to base it on that royalty, plus the lost [7] profits, it would amount to approximately \$21,300. That is a very conservative and fair approach to the basis upon which damages should be based.

Now, Mr. Gibbs further testified that all of the licenses, Exhibits 1 through 9, which are now Exhibits A-1 to A-9 or A-10, were in force and actually operated for the terms mentioned in the agreements, and that the amounts of money that were required under the agreements to be paid were paid by the licensees to Mr. Gibbs.

He pointed out in his deposition that the contracts were not based primarily on the number of units operated, but the controlling factor was the type of operation, the length of season which the games could operate in that particular location, and the amount of business that was possible. He found this theory to be much better than to try to operate on a bookkeeping operation, because books in that type of operation are sometimes not kept, and, if kept, they are irregular.

Particular attention is directed to Exhibit A-10.

That is the agreement between Gibbs and Skill Games, of Long Beach, California. That agreement, so Gibbs testified to, was lived up to by the licensees in all respects, including the payment of money called for. That agreement he says does not reflect the true value of the location. It was made with Skill Games under these circumstances: they had been [8] infringing, we brought suit against them, and they resorted to a consent judgment, and coupled with that, agreed to pay certain sums of money, which were paid. The amount of money which Loeff (skill games) paid, and he operated on the Long Beach Pike quite near Faulkner's—Loeff paid \$10,000 in cash on this agreement, he paid in addition to that \$8,000 on account of attorneys' fees, and he paid \$3,000 a year for two years as a royalty, a total money consideration of \$24,500. That is a competitor of the defendant on the Pike in Long Beach.

And we submit that there is another basis upon which this court may begin to construe or assess damages. Certainly, the defendant in this case should get off no better under any circumstances than a competitor of his did, who is at the same beach, the same location, and who paid the money in cash.

Mr. Gibbs pointed out in his deposition that the Long Beach area is a 12-months operation, as contrasted to most of the other licenses, which were for less duration, and, therefore, the Long Beach area would be far more valuable to a licensee than most of the other locations.

We turn then to an examination of Mr. Gibbs, concerning his occupation and experience, to qualify him as an expert to estimate the values. He has been in the manufacture of amusement equipment, and the operation of amusement equipment, mostly skill games, and his patented game of Fascination for [9] many years. Approximately 850 to 900 licensed units of the patented Fascination game have been operated for a period of about 20 years. Gibbs has not only observed the operation, but he has engaged in some of the operations, as a business, throughout the United States. He has collected the money, regulated the general operation of expenses, and traveled in connection with exploiting the game Fascination from Massachusetts to Florida, and all up and down the Atlantic Seaboard, the Midwest, the Pacific Coast area, the Northwest area, and the Mountain States area, and is familiar with the principal amusement areas in which the game has been installed and might be installed. He is a member of the National Association of Amusement Parks, Pools, and Beaches, which is an association of amusement parks, park owners, managers, concessionaires, and everything pertaining to the general amusement business.

He is able, on visiting an amusement center, he testifies, to make an accurate appraisal of the value of that amusement center in connection with making installations of the Fascination games.

Gibbs testified the worth of the Long Beach area, prior to the installation of any Fascination game is as follows, and I am summarizing his testimony

in that regard. He says that the Long Beach amusement area has always been a good business place for the amusement games, in fact one of the best in the [10] United States. He formerly operated there himself in 1931. At the present time he is investing in the neighborhood of \$50,000 in opening up a location on the Pike in Long Beach. An exclusive installation under the Gibbs patent on the Pike in Long Beach, in the opinion of Gibbs, would be worth about \$10,000 per year license fees. That is all based on his deposition.

If we accept that as expert testimony, which is permissible under the new law regarding damages, the reasonable damage which can be assessed against Mr. Faulkner would be \$10,000 a year times five and one-half years, which is \$55,000.

Now, we turn to a slightly different phase of it. Mr. Gibbs testified he is familiar with the location of 101 West Pike, which Todd C. Faulkner, the defendant, was operating. He first visited there in the summer of 1945, and several times thereafter, 15 or 20 times, he went there, and he said that when he was there he observed the defendant Faulkner was using only 16 units, which is one bank of machines, and sometimes all 32 units; that Faulkner was running approximately 35 games an hour, and sometimes more than that. He also observed that not more than about 20 per cent of all seats were vacant when only one side was operating, and there were usually 13 to 14 units of the 16 available that were actually in play. [11]

I won't go into further details on that.

Gibbs recited in considerable detail his experience in running the Fascination type of game at 103 Pike, which is actually next door to the Faulkner location. There are several pages of that background testimony in the deposition.

Mr. Gibbs testified that, taking into account the give-aways which Mr. Faulkner indulged in,—after each game he gave away coupons which were good for prizes and had to be redeemed—for the Faulkner operation, he was running 35 games an hour, and Faulkner would have realized approximately \$20 an hour profit from the operation.

The profit referred to, says Gibbs, is the difference between the amount which Faulkner gave out in free plays and merchandise and the amount which he grossed.

At other times, Gibbs says, Faulkner operated at 20 cents a seat instead of 10 cents, from which Faulkner would receive \$3.20 per game, and at that time he gave out \$2.00 in free plays and merchandise, leaving him \$1.20 profit per game. Basing the operation on having one side of the units playing, or 16 units, Faulkner had a potential profit of \$20 an hour at the 10-cent price, and approximately \$40 an hour at the 20-cent price.

The profit is what is termed as a gross net, or net gross. In other words, the amount of money which one takes in from the players less the amount which they give out. [12]

Other expenses, such as overhead, rent, and so forth, are in addition to that.

Gibbs estimated that Faulkner paid about \$60

a day on the average for help, rent, and general expenses, and he estimates that on the basis of this observation which he made over the period of several visits to Faulkner's place of business, that Faulkner's net profit from the infringed operation was around \$3,000 a month, or \$36,000 a year. That is on page 33 of the Gibbs deposition.

As I have pointed out, Mr. Gibbs testified at that point that in addition to license fees, his business practice was to manufacture and lease the patented machines to the location, charging his cost, plus an average profit of \$150 per unit. That is on page 34 of the deposition.

Now, there is one thing that Mr. Gibbs testified to concerning attorneys' fees, and while I am at that point in the deposition, I had better mention it. He said he had paid about \$11,300 and some odd, but to clear the record it should be brought out that another \$10,000 was paid for the benefit of Gibbs by the Long Beach Licensee. That does not appear in the deposition and, if necessary, I will be sworn to so testify that the total attorneys' charges paid by or on behalf of Gibbs for this litigation up to January 6, 1950, not the recent ones, but up to January 6, 1950, was twenty-one thousand three hundred some odd dollars. [13]

Do you accept that or do you want me to be sworn?

Mr. Fulwider: No. I will accept Mr. Huebner's statement.

The Court: I forgot what fee was allowed.

Mr. Huebner: There was allowed \$500, and we

made no point of that at the time, but that was up to and through the trial. Since that time there was an appeal by the defendant to the Court of Appeals, and after the decision there were rehearings, petitions for rehearings, and a writ of certiorari to the Supreme Court of the United States.

The Court: Attorneys' fees are not to reimburse you for anything other than for the trial. There is no provision for attorneys' fees for prosecuting an appeal.

Mr. Huebner: That is a point on which I didn't prepare.

The Court: I couldn't fix anything for the Supreme Court or Court of Appeals. So if entitled to anything, it would be as to anything you did since the appeal came down. It says it is merely for the trial of the action. And I have written an article recently on what I think about these extravagant demands for attorneys' fees.

Mr. Huebner: I do not agree that they should be extravagant or large, but in asking for additional attorneys' fees I thought it was a matter that should be brought up, and while not an element of damages, it is a factor which the court can consider in assessing the damages, in arriving at a [14] reasonable royalty, plus whatever the court feels should be added to the attorneys' fees.

The Court: All right.

Mr. Huebner: I have just a couple more things, your Honor.

Now, the purpose of filing the Faulkner deposition was to show that Mr. Faulkner's method of

operating and keeping records, if any, was incomplete and inaccurate. That is all I care to say at this time. I think he was asked questions about it, and his answer invariably was, "You will have to ask somebody else," he didn't know.

The Court: All right.

Mr. Huebner: Just a moment more, and I will be through. I have given, for example, here, the royalty of \$3,000 a year, plus the loss of profits on the 32 units, which would amount to \$21,300.

There is another example which I haven't stated. Now I am discussing, rather than quoting from any deposition, and if we took the potential gross from the units which Mr. Faulkner operated, 35 games an hour, 11 hours a day, at 20 cents,—at 35 games an hour, 11 hours a day, at 20 cents, his income gross would have been around \$750,000 a year. If you take half of that off for prizes, and so forth, theoretically he still would have had \$375,000, and if you allow five per cent royalty on that you get \$18,750 a year royalty, which is [15] well over \$100,000 for the period of the infringement.

If you take as a further example, Mr. Gibbs' example as an expert of the royalty value of that Long Beach area at \$10,000 a year, you have a reasonable royalty accrued under that theory of \$55,000.

There is one further possibility. While profits are not recoverable, the profits that a man realizes, if they are large enough, are sometimes accepted as a basis for determining what the plaintiff lost.

Mr. Faulkner admitted in earlier proceedings which are on file that he made approximately \$22,000 in the last half of 1944, 1945, 1946, and 1947. Although he claims losses, he admits \$22,000. If you average that, which is not a fair thing to do to our side, but even if you averaged it, his net profit for this period must have been 35 or 36 thousand dollars.

I have just cited these to show that the most reasonable amount, from the basis of the defendant, is a base price of \$21,300, and that the more exaggerated beneficial figure to our side is well over \$100,000, so that we are entitled to a figure somewhere in between.

Bearing in mind that the court should allow not only no less than reasonable damages, I am trying to point out, first, that the damages should be no less than the reasonable royalties, and may be increased percentagewise, or trebled, [16] and also interest may be allowed.

The Court: All right. Before we go on let me ask you one question. Have you gentlemen given any thought as to what allowance should be made to Mr. Head for his services?

Mr. Fulwider: I believe that is taken care of, your Honor. We agreed with Mr. Head as to the fee. I have forgotten——

Mr. Huebner: I think it was \$150.

Mr. Fulwider: \$150, and I believe that has been paid.

Mr. Huebner: But there has been no other disposition.

Mr. Fulwider: No.

Mr. Huebner: You paid him \$150.

The Court: What do you want me to do? Fix it at that amount, and say it has already been paid?

Mr. Fulwider: I think so. Mr. Head, you remember, filed a memorandum to be released a long time ago, so he and I talked one day as to what a fair fee would be, and we agreed on \$150, and that has been paid.

The Court: Then I would just make an order discharging him.

Mr. Fulwider: I think that would do it.

The Court: And I think I had better approve the payment of the fee. First, fix the fee at \$150, and provide that it has already been paid. You may want to deduct it as a legitimate deduction in income tax. [17]

Mr. Fulwider: That is right. I hadn't thought of that.

The Court: Then I will fix the fee at \$150, which the court has been informed has been paid, and discharge him.

Mr. Fulwider: All right. First, I would like to say that, as I see the picture, the plaintiff's position is well stated by Mr. Huebner when, just before his close, he was talking about certain amounts being theoretical views. Mr. Gibbs made a lot of generalized statements in his deposition, but it seems to me they are not backed up by the real facts shown in the case. There does not seem to be much dispute but that this is the kind of a case where the measure of damages is the reason-

able royalty, and I think the cases are uniform that where there is an established royalty, then that is accepted by the court as the reasonable royalty.

Mr. Gibbs has introduced some ten different license agreements but some, by their terms, are a little confusing, and that is why I undertook to spend the time to prepare the analysis which I submitted.

I went through each license agreement, and analyzed it, and that analysis is the statement of the facts as portrayed by those particular agreements themselves. They do not jibe with Mr. Gibbs' statement on the deposition as to what his general mode of operation was. He did say this, however, and that is as brought out by Mr. Huebner, that in setting [18] royalties he considered two things; one, primarily—well, he considered one thing, because he boiled it down to how much potential business is there in a given location. Then he arrived at the number of machines which the operator needed for that operation, and then what his total royalty should be per year.

Mr. Gibbs states the number of units per operation is no criteria of the operation itself, but I submit, your Honor, that was taken into account in each and every case, either consciously or unconsciously, because obviously an operator is not going to install 100 units if he can get by with 50. He knows, and Mr. Gibbs knows, about how much business can be done, about how many people there are, and how many units. That is shown by the fact that some of the licenses have as little as

15 or 20 units. Most of them had as many as 50. That seemed true in New York, 50, and on the East Coast. That being the case, the logical thing to do, to arrive at what the agreements do say and the basis they are arrived at, was to reduce the royalty to a per unit basis. If a man paid \$2,000 for 50 units, and another paid \$4,000 for 100 units, the actual royalty paid by each of them was the same. I think that is borne out when you analyze the various agreements.

So, as we see the picture, there is no need to speculate, your Honor, or for the flights of fancy Mr. Gibbs has indulged [19] in, and Mr. Huebner, in getting up those amounts to in excess of \$100,000.

When we requested your Honor to consider this hearing, and have this hearing, instead of going again before the master, you will recall that the request and the notice filed by Mr. Huebner was to the effect, and this is quoting from page 3 of his motion, that the general nature of the hearing to-day "would be for the plaintiff to present license agreements under which royalties have been made and to briefly testify as to the nature of his transactions with the licensees and lessees, as well as the general nature of his business operations under the patent and interference resulting from infringement."

It is a clear case, it seems to me, your Honor, of a reasonable royalty, and the only rule to apply is the established royalty.

So far as Mr. Faulkner's operations are concerned, and the method of accounting, I would take

issue with Mr. Huebner in this: He puts Mr. Faulkner's deposition in here to show he did not keep accurate books, he says. I think the facts are to the contrary. True, Mr. Faulkner does not have much knowledge, and still doesn't have, as to how much money came in and went out, and he didn't always know how many people he had on the pay roll, but we took other depositions. Mr. Herzig came to Long Beach and took an extensive deposition of [20] Mrs. Potter, who had been the bookkeeper for Mr. Faulkner for a long time. We had all the books and records there. That testimony showed that they kept certain slips or charges, whatever you want to call them.

Mr. Huebner: Just a minute. That is not in evidence. I would like to get that in, but unless we can stipulate and consent that those depositions go in, I object to Mr. Fulwider telling what is in those depositions.

The Court: What deposition are you talking about?

Mr. Fulwider: I am not going to recite what is in the deposition, but so long as Mr. Huebner has undertaken to say to the court that the books were not accurate, I will say we took other depositions which will show there were complete books.

Mr. Huebner: And you did not get your people to sign the depositions?

Mr. Fulwider: No, that is not true.

The Court: Let's not get away from the subject. There is one deposition here. This deposition is not signed. Faulkner's deposition is not signed.

Mr. Fulwider: Faulkner's deposition, your Honor, is signed over to the left of the line. He didn't sign on the right line.

The Court: Oh, he signed in the wrong place.

Mr. Fulwider: I think the trouble is that Mr. Huebner [21] was not taking part in the case at the time. Mr. Herzig was handling the depositions, and they were continued by mutual agreement, because we saw it was going to go into a lot of money in the event of any appeal.

The Court: Let's not refer to those that are not filed.

Mr. Fulwider: It is not germane to the issue, your Honor, and I would not have gone into it except for the comment made by Mr. Huebner. Now, if I can have a minute to review these analyses that I have.

The Court: I glanced at the deposition of Faulkner, and he seemed to know very little about the case because he had this young woman whom he authorized to pick up the money and deposit it.

Mr. Fulwider: That is right.

The Court: So of necessity he relied on her for more accurate information.

Mr. Fulwider: She has been his bookkeeper, I guess, for six or seven, or maybe more, years; maybe eight or nine years. She always kept all of his books.

Now, if your Honor will turn to the next to the last page of our Exhibit 1, we analyzed this Loeff Long Beach license agreement. Unfortunately, we

did not number the pages of this. It is page 6 of that analysis, headed "Exhibit 10," as to Arthur Looff.

Now, it is true, your Honor, that Mr. Looff did pay [22] \$24,000 all together, \$24,500, but it is likewise true that a considerable portion of it, in fact all but \$14,500 was litigation expense. And the reason for that was that Mr. Looff was given an exclusive license for the City of Long Beach. Now, the license agreement was obviously written in a way to try to reflect a high royalty, because we find for the four years—or, for the two years of past infringement plus the first two years of license only \$8,500 was paid, and then it is recited in the agreement that the last two years are at the rate of \$3,000 per year, which makes quite a difference. But looking again at the facts, and not at what the parties were trying to do to create a picture for the future, knowing there would be litigation and that they might make a recovery against Mr. Looff and Mr. Faulkner, if we take the entire six-year period, and we say that only \$14,500 was paid in royalties for that period, dividing the six years into the fourteen thousand, we get an annual royalty of only \$2,417 per year that Mr. Looff paid, which is in accordance with the \$2,000 per year royalties which were actually paid in the East.

Mr. Gibbs talks about his plan was to charge \$3,000, but, as a matter of fact, his prior agreements at Coney Island and Atlantic City were at \$2,000 per year, and the six years Mr. Looff operated, it was \$2,400 per year.

Now, another thing. Mr. Loeff operated 64 units. The [23] most Mr. Faulkner ever operated was 32. The testimony is, as Mr. Gibbs admitted, there were times when the second bank was not operated, and that is a fact which we haven't tried to exploit here, that we used only 16. We admit we had 32 open at all times, and if business was not good enough so that all of them were operated, that is beside the point. But under those circumstances, as Mr. Huebner brought out, the defendant was only operating half as many as Mr. Loeff, and Mr. Loeff paid an average of \$40.30 per year per unit. So if we apply Mr. Loeff's royalty, which Mr. Huebner said is the measuring stick, then we have—first, before applying that, I call your Honor's attention to the next page of our analysis, in which I summarized the eastern operations, Long Beach, and all operations.

There were several operations in Coney Island, a couple in Atlantic City and New England. Analyzing all of them, which were big beaches, it came to \$41.20 per unit, and those licenses only carried a maximum of \$42.50 per unit. That was at Atlantic City. And at Coney Island of \$40.00, and the New England beaches of \$41.00.

In Long Beach, right on the pier, and I want to emphasize this, your Honor, because it shows a pattern, that Mr. Gibbs, in spite of his protestations here, has over the years charged just about the same for each of his operations—the average for the big eastern operations was \$41.20, and the average in [24] Long Beach was \$40.30, or for the two

of those, \$40.75. He had two small eastern operations where he only charged \$20 and \$29, and those came to \$24.50 per unit. While in some respects we could draw an analogy between Mr. Faulkner, a small operator here, and those two small operations in the East, the best that Mr. Gibbs can ask for, it seems to me, is an overall average of all these operations. He had a number of big ones, and two little ones, and if we average all the operations, you come down to a figure of \$35.33 per unit per year.

That, your Honor, we submit makes good sense, and it is taken right out of the agreements themselves. That isn't any theorizing. It is what the facts show, and what Mr. Gibbs actually got in dollars.

On the last page of my analysis I took those facts and applied them to Mr. Faulkner's operation. On the basis of six years—I had forgotten he had sued them in September, 1949—and throwing in a couple of extra months, these figures should be revised by perhaps six months, but if we take the established royalties and apply them to Mr. Faulkner's operations, for the operation of six years, and using as the measure of damages the average per unit of all major operations, not taking in the small ones, but taking Coney Island, Atlantic City, the New England beaches and Long Beach, California, the most that Mr. Gibbs is entitled to is [25] \$7,824. That is just plain arithmetic, and not speculation.

If we want to give Mr. Faulkner a little break here, we have equally a fair and reasonable way of

computing it if we use as a measure of Mr. Faulkner's obligation the average of all of Gibbs' operations, and that includes all the little ones, and that brings it down to \$6,700 plus. Or if we want to take Mr. Huebner's suggestion and take the Loeff figure as the measure, we come out with \$7,737.60.

That is just plain arithmetic, and I submit as the measuring stick that should be applied the \$7,700 statement, which is the middle figure. Taking either of the ways of figuring it, as I say, you get \$6,700, \$7,700, and \$7,800, and the middle one is Mr. Loeff's operation in Long Beach, and that is our operation, your Honor.

Mr. Huebner: May I ask, your Honor, whether Mr. Fulwider is making as a part of the record the "Statement of Defendant on Accounting"?

The Court: That is a computation for the benefit of the court.

Mr. Huebner: I am not talking about what he was raising just now. I am talking about the "Statement of Defendant on Accounting," which is sworn to by Mr. Faulkner, to the best of his information and belief, and which he says is based upon his figures.

The Court: That has already been filed. I received [26] only a copy. That was filed as of today as a document, and I received a copy.

Mr. Huebner: I want to make clear that we do not accept that. It should have been verified by the bookkeeper who made it, or she should have been produced for cross-examination. She is not in court, and, consequently, we cannot cross-examine her on

what is meant by "income," and what is included in expenses, and numerous other things concerning the statement.

Mr. Fulwider: We are not offering that as our measuring stick at all. I would not have bothered, except Mr. Huebner said he was going to rely on the so-called estimates of Mr. Gibbs as to what he had done, and what was the evidence, and so forth. We could have brought Miss Potter in, but we didn't think it was of sufficient importance.

Mr. Huebner: I don't have much more to say, your Honor. I might point out just two or three things. If the business wasn't valuable and didn't deserve a substantial royalty after the experience Mr. Faulkner had, why in 1947 did he post \$15,000 cash bond to be able to continue the operation? That isn't consistent with a claim that it isn't worth money to operate down there.

I would like to re-emphasize the fact that Mr. Fulwider has taken a few of the several contracts and broken them down into what he calls units, royalty per unit. That was [27] never the basis of any negotiation on any contract. The whole thing was a cash value placed upon the operation, and not a single contract specified whether there shall be ten or one hundred units. So the fact that Mr. Faulkner chose to operate with only 32 should not give him any privilege he can now rely upon.

I think with that, your Honor, we will rest.

Mr. Fulwider: May I just say one thing: that I did not just analyze some of them. I analyzed all ten, and they are in our Exhibit 1, and I would like

to repeat that while Mr. Gibbs says he does not rely upon the number of units, it is implicit in arriving at what the royalty would be, that Mr. Gibbs has taken how many people are going to come in, and they figure how many units they are going to have.

Mr. Huebner: Well, the record will show they may hold, let us say, 48 or 50 units, and Mr. Faulkner had 32.

The Court: Now, gentlemen, I will have to go over these depositions. One of them was brief, and I ran through it since it was filed. The other was rather lengthy.

Now, while I realize that the law allows a good deal of latitude, I want to say I have no sympathy for the deliberate infringer, but, nevertheless, I believe that the damages awarded should in some way approximate the detriment that was caused, and the various ways of determining detriment have been resorted to by courts in awarding damages. At [28] times the profit has been a criterion, and at other times the loss has been a criterion, and the courts have chosen whichever will be the larger. In addition to that, courts have permitted, when one or the other is chosen, some latitude in adding interest and the like.

I will have to go through these depositions, because you gentlemen are so far part in estimating either the profits or the detriment through loss of licensing by the plaintiff in this case.

I will get to it as quickly as I can, gentlemen.

Mr. Fulwider: Your Honor, could I say just one word? I don't want to overdo this, but just on this

matter of profit, your Honor will recall that profit is taken as a measure of damages quite often when it is a matter of selling items, but on use cases I think the courts are pretty uniform in saying the plaintiff is not entitled to the entire profit from use over a period of a long time. They try to find some other measure, and in the use cases the reasonable royalty or the established royalty is almost always taken, on the theory that the profit that comes to a man in operating the business, even though the equipment is not his, may be due to advertising and a lot of other things.

The Court: All right, gentlemen, the matter will stand submitted. [29]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of September, A.D. 1951.

/s/ MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed September 6, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 18, inclusive, contain the original Additional Findings of Fact on Issue of Damages and Attorneys' Fees; Final Judgment; Notice of Appeal; Cash Deposit in Lieu of Cost Bond on Appeal; Designation of Record on Appeals Stipulation and Order for Correction of Reporter's Transcript and Two Orders Extending Time to Docket Appeal which, together with the record on appeal in the prior appeal in this case to the United States Court of Appeals for the Ninth Circuit, No. 11667, and original reporter's transcript of proceedings on May 28, 1951, and original plaintiff's Exhibits A, A-1 to A-10, B and C and original defendant's Exhibit 1, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2nd day of Oct., A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13120. United States Court of Appeals for the Ninth Circuit. Todd C. Faulkner, Appellant, vs. John T. Gibbs, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 3, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,120

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

STATEMENT OF POINTS RELIED
ON BY APPELLANT

The points upon which appellant will rely on appeal are:

1. The Court erred in basing its estimate of a reasonable royalty to be paid by appellant herein on the average royalty paid by some of appellee's licensees rather than on the average of all such licensees.

2. The Court erred in basing its estimate of a reasonable royalty on the total royalties paid by some licensees of appellee without regard to the number of game units licensed and operated by said licensees, rather than on the royalty per game unit, the appellant having fewer game units than any of the licensees used as the basis for the Court's estimate.

3. The Court erred in using as a basis for its estimate of a reasonable royalty the alleged annual

royalty paid by appellee's licensee Loeff for 1948 and 1949 rather than the true average for Loeff's entire license period computed from the entire consideration paid therefor.

4. The Court erred in holding that \$3,000.00 per year was a reasonable royalty to assess appellant herein and that judgment should therefore be rendered for a total of \$15,000.00.

5. The Court erred in allowing the appellee any additional attorneys fees in this action, and particularly in allowing the sum of \$1,000.00 additional fees.

6. The Court erred in ordering judgment against appellant in the amount of \$15,000.00 damages and \$1,500.00 attorneys fees.

Dated at Los Angeles, California, this 13th day of October, 1951.

FULWIDER & MATTINGLY,
and

ROBERT W. FULWIDER,

By /s/ ROBERT W. FULWIDER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 15, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following to constitute the record on appeal herein.

1. The entire reporter's transcript of the proceedings had in this case in the District Court on Monday, May 28, 1951.

2. Additional Findings of Fact on Issue of Damages and Attorneys fees and Conclusions of Law.

3. Final Judgment.

4. Cash Deposit in Lieu of Cost Bond on Appeal.

5. Notice of Appeal under Rule 73.

6. Order Extending Time for Docketing Appeal and Filing Record Thereon.

7. The following Exhibits Received in Evidence at the Hearing on May 28, 1951:

Plaintiff's Exhibits

A—Gibbs Deposition.

A-1 to A-10—License Agreements attached to Gibbs Deposition Exhibit A (not to be printed.)

B—Faulkner Deposition.

C—Stipulated Facts.

Defendant's Exhibits

1—Analysis of Gibbs License Agreements (Exhibits A-1 - A-10.)

8. Appellant's Statement of Points.

9. This designation.

Dated at Los Angeles, California, this 13th day of October, 1951.

FULWIDER & MATTINGLY,
and

ROBERT W. FULWIDER,

By /s/ ROBERT W. FULWIDER.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 15, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated between the Appellant and Appellee above named through their respective counsel, the Honorable Court consenting, that the record heretofore printed and filed in the earlier appeal of this case, No. 11,667, shall be a part of the record on this appeal but need not be re-printed.

Dated this 22nd day of October, 1951.

FULWIDER & MATTINGLY,

By /s/ ROBERT W. FULWIDER,
Attorneys for Appellant.

HUEBNER, BEEHLER,
WORREL & HERZIG,

By /s/ HERBERT A. HUEBNER,
Attorneys for Appellee.

So Ordered.

/s/ ALBERT LEE STEPHENS,

/s/ HOMER BONE,
Circuit Judges.

[Endorsed]: Filed October 26, 1951.



No. 13120

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TOD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

BRIEF FOR APPELLANT.

FULWIDER & MATTINGLY,

ROBERT W. FULWIDER,

5225 Wilshire Boulevard,
Los Angeles 36, California,

Attorneys for Appellant.

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PAUL P. O'BRIEN
CLERK



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No. 13120
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

TOD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is the second appeal in the above-entitled suit for infringement of United States Letters Patent. The District Court of the United States for the Southern District of California, Central Division, had jurisdiction under 28 U. S. C. 1338. A final decision having now been entered in said District Court, this Court of Appeals has jurisdiction under 28 U. S. C. 1291.

This case originally came up to this Court on appeal from an interlocutory decision of the District Court holding certain claims valid and infringed and certain other claims not infringed. Said decision was affirmed by this Court in 170 F. 2d 34, 79 USPQ 158. (No appeal was taken by plaintiff as to the holding of non-infringement of some claims.) Certiorari was granted by the Supreme Court and after hearing had, the decision of this Court was affirmed in 338 U. S. 267.

Pursuant to the mandates of this Court and the Supreme Court, the District Court resumed jurisdiction of the case for the ascertainment of damages and rendered its final decision thereon. Final judgment was entered in the District Court on June 15, 1951. This appeal is prosecuted from said final judgment, the sole issues being the amount of said judgment and the award of additional attorneys fees to the Appellee.

Statement of the Case.

The patent in suit, No. 1,906,260, issued to Appellee on May 7, 1933, and now expired, covered an electrified Bingo game made up of a series of electrically connected individual playing units arranged in banks, and operable by separate players. Each such unit has a horizontal playing board with five rows of five holes therein, and an annunciator panel with five rows of five indicator lights thereon corresponding to the holes in said playing board. Each player rolls balls across the playing board of his playing unit, and when a ball goes through one of the holes, the indicator light corresponding to that hole is illuminated. The first player to light up five indicator lights in a row on his annunciator panel is the winner of the game and the same is then automatically shut off to prevent further play until the attendant re-activates the electric circuits. Appellee's game is known to the trade as Fascination.

The Appellee has enjoyed a substantial business for a number of years in licensing his Fascination games to operators in various amusement parks and beaches throughout the country. Gibbs' testimony [R. 22] is that during the life of his patent he granted 18 or 19 different licenses, although only ten such license agree-

ments have been submitted in evidence. These are physical Exhibits A-1 to A-10 now before this Court.

The amount of money which a competitive game of this type can earn depends upon the number of players which it can accommodate at one time, which in turn depends on the number of individual playing units connected together to form the game. In practice, the number of playing units per game can be varied between wide limits and of course the number of games in any given location can likewise be varied. Consequently, the total income of an installation depends directly upon the total number of individual playing units included in the installation.

In 1944 the Appellant built and operated at a single location in Long Beach, California under the name of Fawn, the two games which the Court decreed to be an infringement of the patent in suit. Said Fawn games each comprised a bank of sixteen individual playing units generally similar in function to the Gibbs units, the units in each bank being electrically connected to comprise a single competitive game. Appellant never operated more than said two games of 16 units each or a total of 32 player units.

The smallest number of individual playing units licensed in any of Appellee's said license agreements, Exhibits A-1 to A-10, was 48, and the largest number was 150 (except for the license in Long Beach, California, which was not limited as to number).

Four of the license agreements in evidence were for operations in Coney Island, one in Atlantic City, two in small beaches in New York and New Jersey, one covering several beaches in the New England States, and one for operations in Long Beach, California.

All but one of said agreements appear to have been negotiated in settlement of litigation or threatened litigation, and most of the agreements recite that the licensee is bound by injunctions previously or concurrently granted.

Only two of said license agreements were executed prior to the installation and operation of Appellant's Fawn games, and several were executed after this suit was started. Some of said license agreements provide that the licensee will buy the game units from Gibbs, others grant licenses on games already owned by the licensees, at least one provides that the defendant licensee conveys title in his game to Gibbs, and one allows the licensee to manufacture his own games.

Although some oral testimony was introduced concerning manufacturing profits allegedly lost by plaintiff and speculative operational profits allegedly made by Appellant from operating his infringing Fawn games, the Findings and Judgment of the Trial Court are based entirely on the "Reasonable Royalty" theory of damages. The Court found [Finding VI] that a reasonable royalty to be paid by Appellant was \$3,000.00 per year, although under none of the licenses in evidence was this much average royalty paid. Total damages of \$15,000.00 were therefore assessed against Appellant based on five years' operation of his Fawn games. The Trial Court expressly found that Appellee's alleged loss of manufacturing profits was not considered to be an element of damages [Finding VI].

Finding VII awards Appellee additional attorneys fees in the amount of \$1,000.00. There is, however, no evi-

dence in the record showing the amount or value of legal services rendered to Appellee for proceedings in the Trial Court since the trial of this case on its merits.

There are thus two issues presented on this appeal, as follows:

1. Whether or not the Trial Court used the correct means for arriving at a "reasonable royalty" payable by defendant herein as damages, and
2. Whether or not the Court had the right to award additional attorneys fees to plaintiff in this supplemental proceeding and if so, whether or not the award of \$1,000.00 without any specific evidence upon which to base said figure amounts to an abuse of discretion.

Specification of Errors.

1. The Court below erred in basing its estimate of a reasonable royalty on the alleged annual royalty paid by Appellee's licensee Loof for the two years 1948 and 1949, rather than on the true average royalty paid by Loof for the nine years covered by his agreement.

2. The Court erred in basing its estimate of a reasonable royalty on total annual royalties paid by Appellee's licensees instead of on the royalty per playing unit for the units included in said license agreements.

3. The Court erred in allowing any additional attorneys fees to Appellee.

4. The Court erred in ordering judgment against Appellant in the amount of \$15,000.00 for damages and \$1,000.00 attorneys fees.

ARGUMENT.

I.

A Reasonable Royalty Is That Royalty Which Is Negotiated Freely, and Not Under the Compulsion of Litigation or Merely to Coerce Others.

Long prior to the adoption by Congress of the "Reasonable Royalty" rule of damages, the Courts had adopted a similar rule as a convenient means for assessing a defendant's liability when older methods failed. Almost immediately, the corollary was established that where a plaintiff had, by the grant of licenses created an "Established Royalty," said licenses being freely entered into, and not oppressive or inconsistent, the royalty thus established would be *prima facie* evidence of what was reasonable under the circumstances and therefore suitable for use as a measure of damages in patent infringement suits.

One of the earliest Supreme Court cases stating this doctrine is that of *Birdsall et al. v. Coolidge*, 93 U. S. 64, decided in 1876. Mr. Justice Clifford, speaking for the Court, stated the rule at page 70 as follows:

"Frequent cases arise where *proof of established royalty* furnishes a pretty safe guide both for the instructions of the Court and the finding of the jury. Reported cases of undoubted authority may be referred to which support that proposition;
* * *"

"*Evidence of an established royalty* will undoubtedly furnish the true measure of damages in an action at law * * *." (Emphasis added.)

An exception to the Established Royalty rule is stated in *Rude v. Westcott*, 130 U. S. 152, by Mr. Justice Field at page 160 as follows:

“It is true Westcott threatened suit, and when money is paid under threat of suit merely as the price of peace, it furnishes no evidence of the amount or value of the real claim in dispute.” (Emphasis added.)

And at page 164 as follows:

“It is clear that a payment of any sum in settlement of a claim for an alleged infringement can not be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owners of the patents in other cases of infringement. Many considerations other than the value of the improvement patented may induce the payment in such cases. The avoidance of the risk and expense of litigation will always be a potential motive for settlement. (Emphasis added.)

“In order that a royalty may be accepted as a measure of damages against an infringer, who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention; and it must be uniform at the places where the licenses are issued. Tested by these conditions, the sums paid in the instances mentioned, upon which the master relies, cannot be regarded as evidence of the value to the defendants of the invention patented.” (Emphasis added.)

In the Ninth Circuit case of *Dunkley Co. v. Central California Canneries*, 7 F. 2d 972, Circuit Judge McCamant reiterated the above-quoted rule and amplified it with a full discussion of the subject of damages in patent cases.

“The burden devolved on plaintiff to show that the use of the infringing machines brought the defendants an advantage and profit. It was also incumbent on plaintiff to furnish evidence from which the Master could determine the value in dollars of the advantage to the defendants of the infringing machine as compared with the Jones dipper. * * *

“Where there is an *established regular price for a license to use a patented machine*, that price may be taken as a measure of damages against infringers. *Rude v. Westcott*, 130 U. S. 152. (Emphasis added.)

* * * * *

“The royalty should be fixed in the light of the conditions which obtained *when the infringement took place*. It should be fixed at such sum *as the defendants would probably have consented to pay*, rather than dispense with the patented machine. *Page Machinery Company v. Dow, Jones and Co.*, 238 Fed. 369, 372.” (Emphasis added.)

The last-quoted passage states the real essence of the established royalty rule and is firmly grounded in reason. Where an established royalty is used as the measure of damages, it obviously is not a true measure unless it is based on what the parties would have agreed to if they

had been dealing freely and not under economic compulsion. In line with this conception, the Courts have consistently followed a conservative practical approach to the question of damages in patent cases as illustrated by the following further quotation from the *Dunkley* case, at page 977:

“When the Court is called upon to fix a royalty *it should be conservative* in determining the amount. *Consolidated Rubber Tire Co. v. Diamond Rubber Co.* (D. C.), 226 Fed. 455, 459. The amount named *should not be so high* as to preclude the use of the patented machine. *A. Macky Co. v. Garton Toy Co.* (D. C.), 277 Fed. 507, 511.” (Emphasis added.)

The relevancy of the foregoing quotations to our present discussion is clearly apparent when we remember that all of the license agreements submitted by plaintiff herein which are material to the question of damages, were negotiated in settlement of litigation or threatened litigation against defendants and prospective defendants who had substantial investments in electrified Bingo games of the Gibbs type. As testified by Appellee, the cost of a bank of playing units forming a complete game is considerable. That the licensees were fully cognizant of their delicate position is illustrated by the fact that most of Appellee's said license agreements recited previous litigation and bound the licensees to outstanding injunctions, making them subject to contempt proceedings in case of default. This phase of the case will be further developed in the discussion of our subsequent points.

II.

Analysis of Appellee's License Agreements Exhibits A-1 to A-9.

Since the parties are in agreement that the most practical approach to the issue of damages in this case is application of the reasonable royalty rule, the correct interpretation of Appellee's license agreements becomes the real crux of the problem. We will, therefore discuss these agreements rather fully to bring out their salient features. Although these agreements do not show an "established" royalty, it is believed that when properly interpreted they can form a basis for equitably assessing the damages due Appellee herein.

The Coney Island Licenses.

Exhibits A-1, A-2, A-4 and A-5.

All of these licenses cover locations in Coney Island, New York. Since these agreements have substantially the same terms, and license the same number of individual playing units, they are collectively referred to as the Coney Island Licenses.

The first of the Coney Island licenses, Exhibit A-1, dated June 9, 1936, was granted to T. Z. R. Amusement Corp. in settlement of the case of *Gibbs v. T. Z. R.*, D. C. N. Y. 14 Fed Supp. 957. This agreement is one of the two licenses in evidence executed prior to Appellant's operation of his Fawn games.

The T. Z. R. agreement provided (pars. 2 and 3) for a total payment of \$4,000.00 for one year's past infringement and one year's license, *i. e.*, an average royalty of \$2,000.00 per year. After the first year, the royalty was five per cent of the gross, but later became a flat \$2,000.00

per year. [R. 61.] The licensed game comprised 50 individual playing units, and on the basis of a total annual royalty of \$2,000.00 the royalty per playing unit was \$40.00 per year, it being further provided (par. 1) that *no playing units in excess of 50 could be operated* by Licensee. Paragraph 22 specified that Licensor did not waive any rights under the T. Z. R. decree and on any default by Licensee the provisions of said decree could be enforced.

In 1939 the T. Z. R. license was taken over by Eddie's Amusement Corp. and on May 6, 1946, was modified by agreement Exhibit A-2 in evidence. Eddie's Amusement Corp. as successor of T. Z. R. agreed (par 3) to be bound by said decree against T. Z. R. This modification agreement provided for a total royalty of \$2,000.00 per year. The number of playing units being 50, the annual royalty per playing unit remained \$40.00.

The agreement Exhibit A-2 with Eddie's was renewed in 1947 by agreement Exhibit A-4, the number of playing units, the total royalty, and the per unit royalty remaining the same. Likewise, paragraphs 3 and 4 continued to make Licensee subject to the T. Z. R. injunction.

Exhibit A-5, the fourth of the Coney Island licenses, was issued to M. R. Amusement Co., Inc., a Brooklyn corporation. This agreement licensed 50 playing units for a total annual royalty of \$2,000.00, so that the royalty per playing unit was \$40.00 per year. This agreement recites in paragraphs 4 and 5 that the licensee is bound by the injunction in a former case (presumptively the *T. Z. R.* case), and that on default the licensee is subject to contempt proceedings.

Summarizing the four Coney Island license agreements, Exhibits A-1, A-2, A-4 and A-5, it is seen that they

apply to only two locations and are uniform in providing for an annual total royalty of \$2,000.00 for games comprising 50 playing units each, so that the average royalty per playing unit is \$40.00 per year. All of these agreements were made in settlement of litigation or proposed litigation and only the first, Exhibit A-1 was prior in time to appellant's operations.

Atlantic City License.

License agreement Exhibit A-3 was executed with Boardwalk Amusement Corporation of Atlantic City, on January 11, 1947, after this suit was started. The agreement licenses the operation of 60 playing units made according to plaintiff's patent, and (par. 13) licensee is released of all past claims for infringement.

The average royalty paid by Boardwalk Corporation for two years of past infringement plus three years license was \$2,550.00 per year, making the average royalty rate per playing unit \$42.50 per year. This license agreement is very similar to the Coney Island agreements.

Miscellaneous License Agreements.

Exhibits A-6, A-7 and A-8 are not material to our present problem and will consequently be given only brief mention.

Exhibit A-6 purports to be a master agreement giving the Licensee the right to grant sublicenses under the patent. The form of sublicense attached to Exhibit A-6 provides that the licenses *shall only be for a specified number of playing units*, providing however, that the number can be increased by increasing the total royalty.

Only one sublicense was granted under this master agreement [R. 63-64], and it is not in evidence.

Exhibits A-7 and A-8 are licenses granted in 1947 and 1946 respectively for operations in South Beach, Staten Island, New York, and Keansburg Beach, New Jersey, respectively. These installations had 50 and 48 units respectively. Since the seasons at these two beaches were unusually short, they are not comparable to Appellant's operation of his Fawn games. As in Exhibit A-1, how-royalty rates.

New England License.

License agreement Exhibit A-9 made with William O'Brien, on December 5, 1940, is the only license, other than Exhibit A-1, which was made prior to Appellant's operation of his Fawn games. As in Exhibit A-1, however, this licensee had been infringing the Gibbs patent prior to negotiation of the license.

This agreement gives the Licensee the right to operate in three different locations in New England, and also in Florida but Gibbs testified [R. 65] that O'Brien never operated in Florida. Paragraph 3 provides that the Licensee can only operate three games, but that said games can comprise as many units as desired. It is noted however, that the two games specifically referred to in the agreement comprised 50 playing units, so we assume that the third game also comprised 50 playing units, making a total of 150 playing units operated under the agreement.

The agreement ran until May 1, 1950, *i. e.*, for nine seasons following the execution of the agreement. Since O'Brien infringed one season prior to acquiring the license, the agreement covers a total of ten years operation, *i. e.*, one year as an infringer and nine years as a licensee.

As a total consideration for the right to operate said three locations, O'Brien paid \$5,000.00 plus nine annual payments of \$3,000.00, making a total of \$32,000.00. O'Brien also leased 50 playing units from Gibbs for a total price of \$4,000.00. Strictly speaking, this latter payment should not be considered as part of the royalty, but we make no issue of it. With said \$4,000.00 included, the total royalty paid by O'Brien for his ten years of operations was \$36,000.00, making the annual royalty \$3,600.00 for the 150 units in his three locations. On this basis, the royalty was \$1,200.00 per year for each location of 50 units, or \$24.00 per unit per year.

Summarizing the foregoing license agreements, Exhibits A-1 to A-9, we see that they do not prove an established royalty. Of the group, only the New England license, Exhibit A-9, is sufficiently comparable to the Loof Long Beach agreement, Exhibit A-10, to be helpful in ascertaining a reasonable royalty herein. As will be brought out later, the per unit royalty of Exhibit A-9 is almost the same as that of the Loof license now to be discussed. Consequently, these two agreements together tend to create what might be called an established royalty.

III.

Analysis of the Loof License Agreement, Exhibit A-10.

Of the ten license agreements placed in evidence by Appellee this present agreement, A-10, is the most pertinent, since it is for a location in the city of Appellant's operations, to-wit, Long Beach, California. However, this agreement like the others in evidence suffers from evidentiary weaknesses since:

- (1) It was made long (about two years) after appellant started his operations, and
- (2) It was a settlement of an infringement suit then pending.

As the courts have consistently said, these conditions often prevent such agreements from being used to show an established or reasonable royalty. At best they must be carefully scrutinized and analyzed before they can be used as an aid in assessing damages.

These admonitions of the courts are particularly applicable to the Loof agreement, since it was admittedly made with this present litigation in mind, and is a clear attempt to set up a fictitious royalty rate which could later be used against others, as attempted here, to "establish" an inflated royalty as a measure of damage.

However, since we believe that when properly interpreted in the light of *all available facts*, the Loof agreement can be helpful in arriving at a reasonable royalty in this case, we will discuss it in detail.

The Loof agreement is dated July 25, 1946, and recites that on February 15, 1946, Gibbs sued Loof and his associates for infringement of the patent here in suit, and that the parties wish to settle said litigation.

Paragraph 1 provides for a consent decree of validity and infringement, and Paragraph 2 grants to Loof an exclusive license to operate the Gibbs games in two locations in the City of Long Beach without limitation as to the number of playing units used. Paragraph 3 releases the licensees from all claims for past infringement, and Paragraph 4 requires Gibbs to take appropriate means to prevent any apparatus of his manufacture being used in the City of Long Beach.

Paragraph 5 provides for a down payment to Gibbs of \$10,000.00 (of which \$1,500.00 is earmarked by Paragraph 6 for future litigation), plus an additional \$6,000.00 payable in equal installments on May 1, 1948 and 1949, *i. e.*, a total of \$14,500.00 was payable to Gibbs in full compensation for past infringing operations and a license for the four remaining years of the patent.

Nothing is said in the agreement as to how long Loof had infringed the Gibbs patent prior to execution of the agreement. Gibbs testified in his deposition [R. 66] that he only "saw" infringement in 1945, although Loof "may have operated the year before." This would indicate two years of past infringement.

However, the fact of the matter is that Loof infringed the Gibbs patent for *five years* before the settlement agreement Exhibit A-10 was executed. Douglas Wiser, a partner of Loof, testified at the original trial of this action [R. 84, 85 of record in appeal No. 11,667] that the Loof Lite-a-Line games were built in 1940 and were first operated in Long Beach in 1941, *five years* before execution of Exhibit A-10.

It is therefore apparent that the \$14,500.00 paid by Loof under Paragraph 5 of Exhibit A-10 was full com-

pensation to Gibbs (reasonable royalty) for Loof's nine years of operations—five years before the execution of the agreement and four years thereafter. Dividing said total royalty of \$14,500.00 by said nine years of operations, we find that the average royalty paid by Loof was in fact only \$1,611.00 per year.

It is apparent therefore that the statement in Paragraph 5 of the Loof agreement that the payments of \$3,000.00 payable in 1948 and 1949 represented the royalties for those years, is contrary to the fact, for there is nothing in the record to show that the license was any more valuable during those last two years than it was before.

If we take the statement in Paragraph 5 at its face value we have an absurdity, since then the only compensation paid for the first seven years of Loof's operations was the \$8,500.00 down payment, or an average of \$1,214.00 per year. Why should the license be worth \$1214.00 per year for the first seven years, and then \$3,000.00 per year for the last two years thereof? It is quite apparent therefore that the wording of Paragraph 5 does not correspond to the facts and must be disregarded.

In order to use the Loof license as a basis for determining the "reasonable royalty" that Appellant should pay as damage herein, we must, *if we are to follow the facts* rather than the self-serving statements of the Loof agreement, use the factual figure of \$1,611.00 above-mentioned as the *established* annual royalty, rather than the fictitious \$3,000.00 figure urged by Appellee and used by the Trial Court.

For the five and one-half years of Appellant's infringement this would, without more, fix the damages at

5.5 x \$1,611.00 or \$8,861.00. *But this still is only a part of the true picture.* Upon examining further we see that Appellant only operated *one* establishment whereas Loof operated two, and Appellant only operated 32 playing units, whereas Loof under his license operated 64.

The value of a license obviously depends upon the potential income possible from exercising that license. Just as obviously the potential income possible from one of the games in question depends upon the number of customers who can play it at the same time, *i. e.*, the number of playing units in operation. Therefore in any such operation, the reasonable value of the "right to operate," *i. e.*, the reasonable royalty to be charged for such operation, must be dependent on the number of playing units in the given installation.

Assuming that Loof's royalty of \$1,611.00 per year for the operation of 64 units was reasonable—then the most that Appellant should pay as a "reasonable royalty" for the operation of his 32 units is *one-half* of Loof's royalty, or \$806.00 per year. For five and one-half years this totals \$4,433.00.

Using the unit royalty approach applied in our discussion of the eastern licenses we arrive at the same amount for the damages, but by a different route. Dividing Loof's annual royalty of \$1,611.00 by 64, we get a royalty of \$25.00 per unit per year. A reasonable annual royalty for Appellant then would be 32 x 25 or \$800.00, which multiplied by his five and one-half years of operations gives \$4,400.00 as the total damages payable herein. (The differences in the results obtained by the two methods of computation are because fractions have been ignored.)

None of the other provisions of the Loof agreement deal with the matter of royalties, but it is of interest to note that in Paragraph 6 of the agreement, Gibbs agreed to immediately start legal proceedings against Tod C. Faulkner, the Appellant herein, and Loof agreed to pay up to \$10,000.00 towards the cost of said suit. As a result of that agreement, this suit was brought, and the evidence is, that Loof, in accordance with his agreement, paid said \$10,000.00 toward the cost thereof.

IV.

There Is No Evidence to Support the Trial Court's Finding That \$3,000.00 Per Year Is a Reasonable Royalty.

From the foregoing summary and analysis of the ten license agreements offered in evidence by Appellee to establish a reasonable royalty, it is seen that not one of said agreements substantiates the Trial Court's finding that \$3,000.00 per year is a reasonable royalty to be paid by Appellant herein.

As both Appellee and his counsel have repeatedly said, the value of any particular location for competitive games of the type involved here depends upon the amount of business that can be done, *i. e.*, the number of customers available. The amount of income that can be derived from those customers, and therefore the amount of royalty which the operator can afford to pay, depends upon the number of customers which his game can handle per hour, *i. e.*, the number of individual playing units which

the operator has available for use. Consequently, more playing units mean more customers handled, which means more income, which means more royalty can be paid.

Obviously therefore, total royalty payable under any license agreement must be related to, and arrived at on the basis of, the number of playing units involved. This would seem to be a self-evident fact, so that in each case, whether the license agreement mentions the number of units or not, that factor of necessity had to be considered by the parties in agreeing on the total royalty for a given location.

The Coney Island licenses all had an average annual royalty of \$2,000.00 for 50 playing units, or a per unit royalty of \$40.00 per year.

The Atlantic City license had an average annual royalty of \$2,550.00 for 60 playing units, or a per unit royalty of \$42.50 per year.

The licenses for South Beach and Keansburgh Beach had average annual royalties less than \$2,000.00 for 50 and 48 units respectively with per unit royalties under \$30.00 per year.

Under the New England license agreement three separate locations having a total of 150 playing units were licensed for \$3,600.00 per year, \$1,200.00 per location per year or \$24.00 per unit.

The Loof Long Beach license had an average annual royalty of \$1,611.00 or a per unit royalty of \$25.00 per year.

Since there is not one shred of documentary evidence to support the Trial Court's finding, it is assumed that the Court must have been misled by the confusing language in Paragraph 5 of the Loof agreement, since this is the only one of the license agreements that even purports to establish a royalty of \$3,000.00 per year. But, as previously discussed, this language is not consistent with the facts and cannot be taken at its face value.

If the Loof agreement is taken at its face value, then it is clearly collusive and entitled to no weight whatsoever. The Loof agreement on its face is just like a \$100.00 price tag on an article sold for \$50.00. Both the dealer and the customer know it is merely a \$50.00 article. The price tag is only for the benefit of the uninitiated or the unwary.

But even if we took the Loof agreement at its face value, it still is not evidence that \$3,000.00 is a reasonable annual royalty for Appellant, for Appellant only operated *half* as many units in *half* as many locations as Loof. So even on this basis, the damages could not exceed \$1,500.00 per year, or a total of \$8,250.00 for the entire five and one-half years.

But, as previously shown, the Loof agreement cannot be taken at its face value. It can only be considered as evidence of *what the parties did*, not what they said. On this basis, the correct measure of damages, as computed earlier herein, is \$806.00 per year, making a total of \$4,433.00 for five and one-half years. Any finding in excess of this amount is clearly erroneous.

V.

The Findings of the Trial Court Are Not Entitled to the Usual Presumption of Validity Since All of the Evidence Before the Court Was Documentary.

Since the only testimony in this case was by deposition, and the only real evidence consists of appellee's license agreements, Exhibits A-1 to A-10, no presumption of validity attaches to the findings of the Trial Court. As the record shows, the hearing before the Court merely consisted of short statements of counsel and the introduction of exhibits. Consequently this Court is in as good a position as the Trial Court to consider the evidence. And in view of the manifest error of the Trial Court, it is thought that this Court will wish to consider all the evidence strictly on its merits.

The following cases clearly state the majority rule consistently followed by this circuit with respect to Rule 52A. In *Carter Oil Company v. McQuigg* (C. C. A. 7), 112 F. 2d 275, Judge Evans stated:

"Where the question is one of veracity, it is clear that the Appellate Court should give controlling weight to the trier of fact who saw and heard the witnesses. This is well established. Where the testimony consists of documentary evidence and depositions, a master is in no better position to determine an issue of fact than a reviewing court. The District Court's findings on such evidence are likewise subject to free review, unaffected by presumptions which ordinarily accompany their findings on controverted issues."

This Court in the case of *Equitable Life Assurance Society of the United States v. Irelan*, 123 F. 2d 462, clearly stated the rule as follows:

“Since all testimony bearing on the circumstances antecedent to and surrounding her death was by deposition, the finding of accidental death, while it is justly entitled to consideration, has not the weight we would otherwise be obliged to concede to it. This court is in as good a position as the trial court was to appraise the evidence, and we have the burden of doing that. * * * As is well known, in the Federal courts, where the testimony in equity or admiralty cases is by depositions, a reviewing court gives slight weight to the findings.”

Likewise in the case of *Stuart Oxygen Co., Ltd. v. Josephian*, 162 F. 2d 857, 74 U. S. P. Q. 117, Judge Bone, speaking for the Court, and quoting from the case of *Nichol, Inc. v. Schick Dry Shaver*, 98 F. 2d 511, 38 U. S. P. Q. 510, stated:

“The testimony before the trial judge revolved around the exhibits (full size commercial units) and embraced a discussion of the meaning of the term stability as used in the claims in the patent, the absence or presence of prior art, and the Appellee’s charge that Appellant deliberately copied his device. The terms of the patent and the respective devices of the parties are also before us for our inspection. The facts are clear and undisputed and the question of infringement in this case can be determined by comparison of structures and is a question of law. Therefore, this Court will examine for itself the device of Appellant and determine as a matter of law whether it infringes the patent of Appellee. * * *”

VI.

**There Is No Basis in the Record for the Allowance
Made to Appellee of Additional Attorneys Fees
in This Case.**

(a) The Trial Court did not reserve the right at the close of the trial on the merits to award additional attorney's fees;

(b) No evidence was introduced concerning the extent or value of the legal services performed for Appellant in the Trial Court subsequent to the trial of the case.

(a) In the recent case of *Laufenberg, Inc. v. Goldblatt Bros., Inc.* (C. A. 7), 187 F. 2d 823, 89 U. S. P. Q. 5, the Seventh Circuit Court of Appeals ruled squarely on the right of the Trial Court to award attorney's fees upon remand of an appealed case and held that unless the Trial Court expressly reserved the right at the close of the case in chief to award attorney's fees, it lost that right. Here we have a stronger case than the *Laufenberg* case since the Trial Court by the grant of attorney's fees at the end of the trial without reservation, waived its right to grant additional fees later.

In the *Laufenberg* case, the Court of Appeals said:

"We think the Trial Court was correct in holding that under the circumstances of this case, it had no jurisdiction to award attorneys' fees at the late date when defendant made its motion therefor."

* * * * *

"We hold that the statute means that if an award of attorneys fees is to be made by the Trial Court, the Judge should do so either at the time of the

entry of judgment or specifically reserve jurisdiction in such judgment to do so at some reasonable date after the time for appeal has expired, if in fact no appeal is taken, or in case of appeal at such reasonable time after all such appellate action has been terminated and the mandate filed in the Trial Court.”

In the lower court the Appellee sought an award of attorneys’ fees to cover his costs on the previous appeal to this Court and the Supreme Court, but Judge Yankwich ruled against him as follows [R. 110]:

“The Court: I couldn’t fix anything for the Supreme Court or Court of Appeals. So if entitled to anything, it would be as to anything you did since the appeal came down. It (the statute) says it is merely for the trial of the action.”

It is submitted that under the statute and the law as enunciated by the Seventh Circuit, the further award by the Trial Court of attorneys’ fees to Appellee for this proceeding was erroneous and should be reversed.

(b) Even if the Trial Court had reserved authority to award additional attorneys’ fees to cover the present proceedings in this case, this part of the judgment [Par. VIII, R. 11] should be set aside since there is no sufficient finding to support it. The only finding by the Court on this phase of the case is No. VII [R. 7] stating that “the Court now finds that the further sum of \$1,000.00 should be allowed as additional attorneys’ fees, which sum is reasonable and nominal in view of the nature and extent of the litigation.” As the Court itself remarked [R. 110] it could not allow any attorneys’ fees for proceedings had in the Court of Appeals or the Supreme Court, but

such is the inference from the latter part of Finding No. VII, speaking of the “nature and extent of the litigation.”

In any event, there is no evidence whatsoever in the record substantiating the award of \$1,000.00, or any other *specific amount*, for further proceedings *had in the Trial Court* subsequent to the main trial of the case. There is no evidence in the record as to how much work has been done *in the Trial Court*, or what its value is. Consequently the award should be reversed.

In *Dubil v. Rayford Camp and Company*, (C. A. 9), 184 F. 2d 899, 87 U. S. P. Q. 143, this Court stated as follows:

“The Court below has not made plain precisely what was the basis of its conclusion in this regard. It must do so.

“As we have just said, the basis on which attorneys’ fees are to be awarded must be stated clearly. Otherwise, it becomes the duty of the reviewing Court to set the award aside. It is not the duty of the reviewing Court to interfere with the exercise of the discretionary power confided to the Trial Courts by Congress to award attorneys’ fees in proper cases, except where there is an abuse of discretion amounting to caprice or an erroneous conception of law on the part of the Trial Judge.”

The foregoing citation would seem to be a complete answer to the award made in this case. It should be vacated.

Conclusion.

1. The judgment for \$15,000.00 damages should be reversed.
2. Judgment for damages should be entered in favor of Appellee in the amount of \$4,433.00.
3. The judgment for attorneys' fees in favor of Appellee should be reversed.
4. Costs on this appeal should be awarded to Appellant.

Respectfully submitted,

FULWIDER & MATTINGLY,

ROBERT W. FULWIDER,

By ROBERT W. FULWIDER,

Attorneys for Appellant.



No. 13120

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

BRIEF FOR APPELLEE.

HUEBNER, BEEHLER, WORREL & HERZIG,
HERBERT A. HUEBNER, and
ALBERT M. HERZIG,

610 South Broadway,
Los Angeles 14, California,

Attorneys for Appellee

FILED

JAN 30 1952

PAUL P. O'BRIEN
CLERK



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No. 13120

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United States Court of Appeals

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Appellant,

vs.

JOHN T. GIBBS,

Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

Additional pertinent facts not mentioned in appellant's brief are as follows:

The infringement by the appellant Faulkner was deliberate and wilful. Faulkner admittedly set out to build a game similar to the Loof game on the Pike at Long Beach [Orig. R. 93]* which had been admittedly copied from the Gibbs patented machine [Orig. R. 81].

Original Finding of Fact XIII [Orig. R. 38] reads as follows:

“The defendant Todd C. Faulkner derived the Fawn game from an examination of a similar game

*Refers to the record before this Court on appeal dealing with the merits. Citations noted as “R.” refer to the present record on appeal.

being operated by one Arthur Loeff on the Pike in Long Beach, California. The said Loeff game had in turn been copied from a game embodying the subject matter of the said Gibbs patent operated by the plaintiff Gibbs at Santa Monica, California, and on the Pike at Long Beach, California. The said Fawn game was thus not original with the defendant Todd C. Faulkner, but was derived from the said Gibbs patent."

After a preliminary injunction was granted against Faulkner, enjoining infringement, Faulkner made some inconsequential changes in the infringing apparatus and continued to operate notwithstanding the injunction [Orig. R. 37]. After the modified machines were held to infringe, and permanent injunction issued, he deposited a \$15,000.00 cash *supersedeas* bond and continued to operate, even after this Court of Appeals affirmed the judgment of the District Court.

During the main trial the Court remarked to Faulkner's expert witness (the late Harold W. Mattingly, Esq.):

"You know very well, of course, that these people [Faulkner and his manufacturer] went out and copied this thing [the Gibbs patented game]; and the only deviation they made is either on a lawyer's advice or technician's advice as to how to get around it. Is that not a fact?

The Witness: The way to avoid the patent, yes."
[Orig. R. 201.]

The District Court again, in the recent hearing on damages, referred to Faulkner as a *deliberate* infringer [R. 123].

Faulkner does not know how much he took in from the infringing business. Throughout the nearly six years of infringement, and notwithstanding that upon several occasions he was given judicial notice that there would come a day of reckoning, he neglected (or intentionally avoided) maintaining proper records of account, and when asked about receipts and expenses, professed ignorance. [See Faulkner testimony, R. 77 *et seq.*]

Inasmuch as the infringing business was potentially capable of bringing in an annual gross running into six figures, the failure to keep records was for the obvious intent of evading liability for damages.

By stipulation, the facts are that two infringing "Fawn" games of 16 units each, or a total of 32 units, were operated by Faulkner from approximately August, 1944, to December, 1949, and were customarily open to the public from twelve noon to 11 P. M. [R. 101]. Sometimes Faulkner charged 10 cents per game per person, sometimes 20 cents. The machines would accommodate one person at each unit, or 32 players at a time, and the rate of play was about 35 games an hour [R. 45-46].

The potential income, 35 games an hour, 11 hours a day, at 20 cents, was \$750,000.00 a year. If half of that is deducted for prizes, the annual gross profit would be \$375,000.00. A five per cent royalty would amount to \$18,750.00 a year, which exceeds \$100,000.00 for the period of the infringement.

The appellant denies an income like that, but produced no evidence worthy of the name, to establish anything less.

Aside from the facts of location, number of infringing machines, period and hours operated, and amounts charged

for play, the only acceptable evidence was offered by appellee Gibbs.

Gibbs produced three types of proof:

1. Licenses under the patent.
2. Opinion as to what Faulkner made.
3. Opinion as to the value of a license in Faulkner's location.

Under the first proof, an established royalty of \$3,000.00 a year is shown for locations of the Faulkner character.

Under the second, Faulkner realized an estimated \$36,000.00 a year profit which could be a basis for determining damages [R. 50-51].

By the third type of proof, the royalty value of Faulkner's Long Beach area was \$10,000.00 a year.

The District Court fixed the damages at *less than* the established royalty.

SUMMARY OF ARGUMENT.

1. The District Court was unduly conservative in fixing damages, and under the law could have, and should have, allowed more.

2. Attorney's fees were justified by the deliberate infringement, and obstructionist tactics of appellant, and the amount allowed is nominal.

ARGUMENT.

I.

The District Court Was Unduly Conservative in Fixing Damages, and Under the Law Could Have, and Should Have, Allowed More.

By amendment to R. S. 4921, 35 U. S. C. 70, in August of 1946 the statute relative to damages was changed to read in part:

“and upon a judgment being rendered in any case for an infringement, the complainant shall be entitled to recover general damages which shall be due compensation for making, using or selling the invention, *not less than a reasonable royalty therefor*, together with such costs and interest as may be fixed by the court.” (Italics ours.)

Prior to the amendment, there were many Court decisions approving an established royalty as a measure of damages against infringers. The general principles involved were carried over into the amendment, except that the courts are now given greater latitude and authorized to render a judgment for *general damages* which shall be due compensation, *not less than* a reasonable royalty.

What is a reasonable royalty may be determined by reference to existing license agreements, or by practices in the trade, by expert opinion, or by the Court's independent appraisal of the situation. It is important to note that the Court is not restricted to a reasonable royalty, but that a reasonable royalty is the *minimum*.

In fact, even under the old practice, evidence of what is reasonable royalty was quite as admissible as that of an established royalty.

Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641; 59 L. Ed. 398.

In the case of *Austin-Western Road Machinery Co. v. Disc Grader & Plow Co.*, 291 Fed. 302, C. C. A. 8th, 1923, it was held that an allowance *in addition* to an established royalty is not error. In this particular case 15% additional was allowed. Cases cited were:

Dunkley Co. v. Vrooman (C. C. A.), 272 Fed. 468;

Malleable Iron Range Co. v. Lee (C. C. A.) 263 Fed. 896.

The *Austin* case was cited with approval in *Horvath v. McCord Radiator & Mfg. Co.*, 100 F. 2d 326, C. C. A. 6th, 1938.

What constitutes a reasonable royalty under the new law seems to be based upon the same principles as the determination of reasonable royalty for the purpose of fixing damages under the old law. Thus an established royalty actually in effect between the patentee and one or more licensees has frequently been accepted as reasonable royalty; otherwise the Court has had to have recourse to fact and expert evidence and arrive by logic and deduction at what should be considered reasonable.

Appellant has attacked the \$3,000.00 "established royalty" figure by endeavoring to dissect the ten license agreements and also to urge that most of them are dated subsequent to the instant infringement. If the agreements are construed in their entirety, it will be found that appel-

lant is in error by his dissection, and that the \$3,000.00 figure is approximately correct. In any event, there were \$3,000.00 royalty agreements in effect.

Mr. Gibbs mentions the \$3,000.00 royalty figure as the general basis for his licenses on locations open more than two and one-half to three months a year [R. 22]. He had several oral agreements in effect which paid \$3,000.00 a season, plus the purchase of equipment from Gibbs [R. 54].

For appellee's purpose, the licenses may all be disregarded in favor of Mr. Gibbs' opinion [R. 41] that the location was worth about \$10,000.00 per year license fee; or in favor of an even more advantageous interpretation, wherein the potential infringing operation is shown capable of realizing a gross profit of about three hundred seventy-five thousand dollars (\$375,000.00) per year, on which only a 5% royalty would amount to eighteen thousand seven hundred fifty dollars (\$18,750.00) per year.

Where a defendant, as the appellant here, acted with full knowledge and in wanton and wilful disregard of complainant's rights, every doubt as to damages should be resolved against the infringer.

Rose v. Hirsch, 94 Fed. 177;

Regina Music Box Co. v. F. G. Otto and Sons,
114 Fed. 505;

Consolidated Rubber Tire Co. v. Diamond Rubber Co., 232 Fed. 475 (Affirmed 226 Fed. 455).

It is clear that the Court is not bound by "established royalty," and if the evidence of established royalty is inadequate the Court may make up its own mind. Here,

the District Court accepted \$3,000.00 a year as an established royalty, and used that as a general basis for computing damages. But it was not bound to do so.

It has been emphasized by the United States Supreme Court that under the 1946 Amendment the successful plaintiff is entitled to recover damages *not less than a reasonable royalty*.

United States v. National Lead Company, 332 U. S. 319, 67 S. Ct. 1634, 91 L. Ed. 2077, 73 U. S. P. Q. 498 (footnote 8 of the opinion).

Even under the reasonable royalty doctrine, considerable latitude is permitted.

In one reported case where there was no evidence of an established royalty, the Court of Appeals for the Sixth Circuit found that 10% of the price secured by defendant from the sale of the infringing machine to jobbers was a reasonable royalty.

Autographic Register Co. v. Sturgis Register Co., 110 F. 2d 883 (C. C. A. 6, 1940).

In another case a royalty of ten cents per package fixed by a Master, was held reasonable upon a showing that the plaintiff's sole licensee paid 7.2 cents per package. (*Wedge v. Waynesboro Nurseries, Inc.*, 31 Fed. Supp. 638 (D. C. W. D. Va., 1940).) In another case where there was a single sale of the infringing item, the Court found a reasonable royalty to be 12½% of the sale price of the infringing product.

Anstral Sales Corporation v. Jamestown Metal Equipment Co., Inc., 45 Fed. Supp. 360 (D. C. W. D., N. Y., 1942).

What is reasonable royalty was discussed in the Eastern District of New York in a case under the 1946 Amendment, wherein the Court stated:

“* * * in my opinion, twenty-five per cent is too high, and that three per cent is too low, for the reason that this would mean one could infringe with impunity even if it has no license, and then when found to be an infringer, pay only that which a license would have required. Ten or fifteen per cent would obviate this criticism as a business proposition, and the evidence will support what I find to be the reasonable damage.”

Otis Elevator Company v. John W. Kiesling & Son, Inc., 87 Fed. Supp. 408, 83 U. S. P. Q. 289.

It has been emphasized that the damages allowed shall be *due compensation*.

Ric-Wil Company v. E. V. Kaiser Company, 179 F. 2d 401, 84 U. S. P. Q. 121 (7 Cir., 1950).

We have not been able to cite much authority from Court of Appeals decisions under the new law, because apparently there have not yet been many cases decided in the higher courts.

In conclusion on this point, we urge this Court to revise the amount of damages upwardly. If that is not done, Faulkner, a deliberate infringer, escapes the consequences of his acts by paying even less than licensees of corresponding operations, because he was not called upon to buy the equipment from Gibbs, and thereby saved about \$5,000.00 which would have been profit to Gibbs [R. 53]. Faulkner should pay even more than voluntary licensees, under all principles of equity.

II.

Attorney's Fees Were Justified by the Deliberate Infringement, and Obstructionist Tactics of Appellant, and the Amount Allowed Is Nominal.

We are in full accord with the general principle that attorneys' fees in patent cases should be the exception and not the rule, and that even when the exception justifies attorneys' fees they should be relatively nominal.

The facts in the present case support the exception. Infringement by Faulkner was deliberate from the inception and continued throughout the remaining life of the patent, a period of nearly six years, notwithstanding that Faulkner knew from the complaint, if not previously, that the Gibbs' patent had been adjudicated in New York as valid and infringed. In the present litigation, at no stage was there any ruling or decision adverse to the patent in any court, which could justify an opinion that Faulkner had a meritorious defense.

Subsequent to the trial in the District Court, accounting proceedings were conducted before David B. Head, Esq., as Special Master. Details are not revealed in the present record on appeal, but reference is made thereto in the present Record, page 10, Finding of Fact V, pages 18, 23, 112-113. It should not be necessary to bring up any additional record to establish that these proceedings ended ineffectively, in view of the fact that Judge Yankwich heard the matter of damages *ab initio*, as is obvious from the context of the hearing on May 28, 1951.

One of the difficulties placed in the way of appellee by appellant is set up in Finding V, R. 6, wherein said finding reads in part:

"The defendant, however, is relying upon information furnished him by his employees, and no books or

records supporting his contention were produced before this Court, nor were the employees called as witnesses.”

Appellee’s counsel took the deposition of appellee Gibbs March 28, 1951, for use in the hearing and took the deposition of appellant Faulkner on February 5, 1948. It is also fully apparent from the context of the record [see colloquy of counsel, R. 116] that other depositions were taken in connection with the issue of damages which were not used in the hearing but which did involve services of counsel. For example, appellant’s attorney, Mr. Fulwider, himself stated on page 116 of the Record:

“Mr. Herzig came to Long Beach and took an extensive deposition of Mrs. Potter, who had been the bookkeeper of Mr. Faulkner for a long time. We had all the books and records there. That testimony showed that they kept certain slips or charges, whatever you want to call them.”

No supporting data is needed to show that counsel for appellee were present at the hearing before Judge Yankwich, May 28, 1951. Preparation for all of the depositions and hearings was necessary. After the hearing in Court on May 28, 1951, counsel for appellee prepared the Findings of Fact, Conclusions of Law and Judgment, which are in the present record.

The final hearing constituted a trial, namely, that concerning damages which was an issue not tried in the original trial on the merits.

Under the amended patent statutes, the District Court had full authority to fix additional attorney's fees. 35 U. S. C. 70, as amended, reads in part:

"The Court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry judgment in any patent case."

Certainly there the Court entered judgment as to damages. There were in fact two trials; the first one on the merits of the patent, and the most recent on the issue of damages. Under these facts it was not necessary for the District Court at the close of the first trial, when awarding attorney's fees, to reserve the right to award additional attorney's fees at the close of a future trial on damages.

The case of *Laufenberg, Inc. v. Goldblatt Bros., Inc.*, C. A. 7, 187 F. 2d 823, 89 U. S. P. Q. 5, cited in Appellant's Brief, is not in point. In that case the District Court after trial dismissed the complaint. There was no subsequent trial on any issue. The question was whether the District Court if it intended to award attorney's fees to the prevailing defendant should have done so, or reserved the right to do so, at the close of the trial, and the Court of Appeals held that it should.

We recognize the decision of this Court in *Dubil v. Rayford Camp and Company*, C. A. 9, 184 F. 2d 899, 87 U. S. P. Q. 143, that the basis on which attorney's fees are to be awarded must be stated clearly. This has been done.

Finding of Fact III [R. 5], complies with this requirement. It reads in part as follows:

"Since January 6, 1950, plaintiff Gibbs has incurred legal expenses in connection with the issue of dam-

ages for his attorneys' services in investigating the defendant's operations, taking depositions on the subject of damages, moving before this Court for an assignment of damages, preparing for a hearing on the same, and conducting a hearing before this Court on May 28, 1951."

Finding of Fact VII [R. 7], reads in part:

"* * * the Court now finds that the further sum of One Thousand (\$1,000.00) Dollars should be allowed as additional attorney's fees, which sum is reasonable and nominal in view of the extent of the litigation."

We urge that in view of the showing made and the Findings of Fact, there is no basis for suggesting an abuse of discretion on the part of the District Court in allowing the relatively nominal sum of One Thousand Dollars as additional attorneys' fees. Such allowance on the showing made is not in conflict with any of the decisions of this Court dealing with attorneys' fees.

Respectfully submitted,

HUEBNER, BEEHLER, WORREL & HERZIG,
HERBERT A. HUEBNER, and
ALBERT M. HERZIG,

Attorneys for Appellee.

Los Angeles, January 25, 1952.

No. 13120

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

REPLY BRIEF OF APPELLANT.

FULWIDER & MATTINGLY,

ROBERT W. FULWIDER,

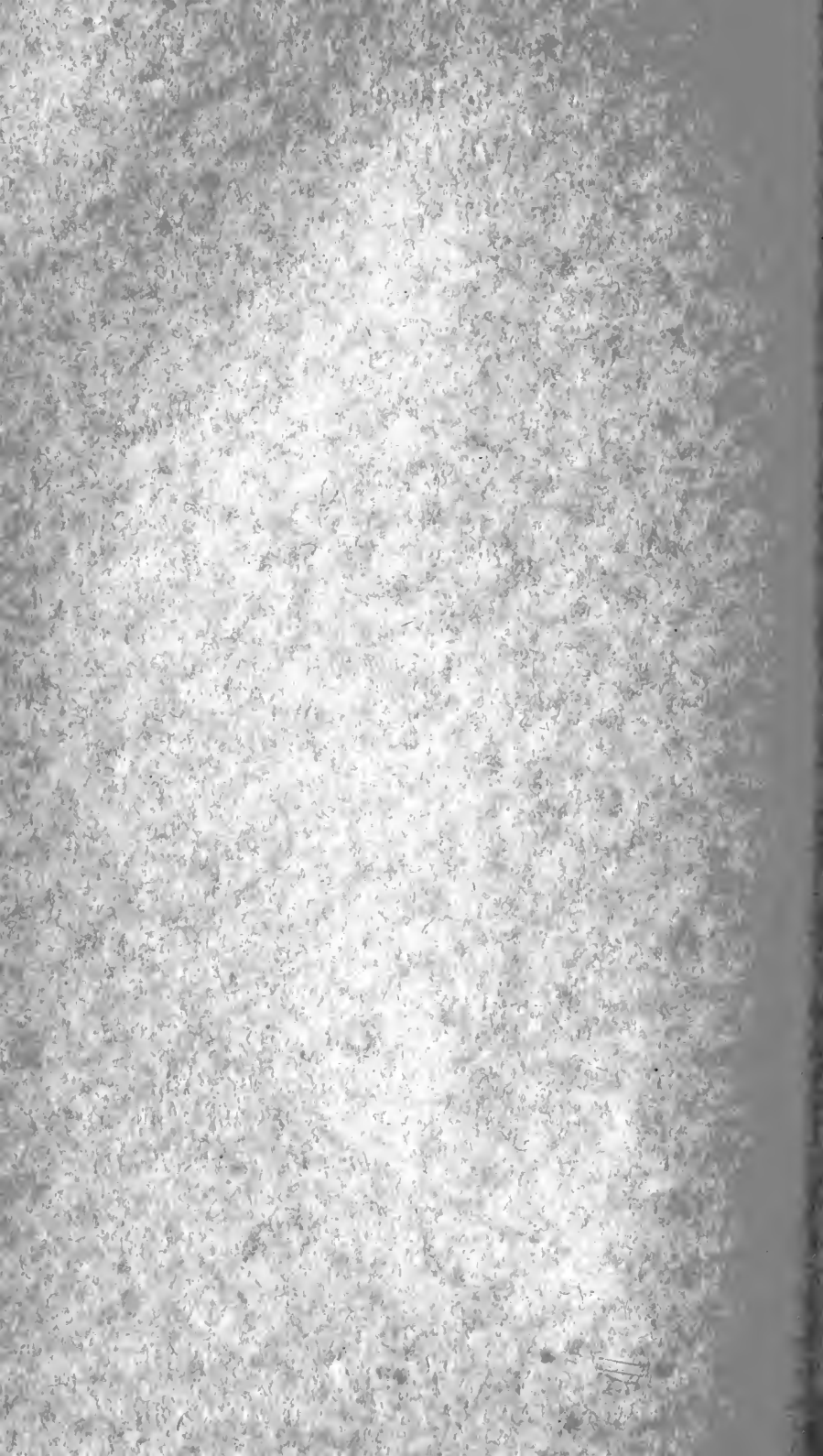
5225 Wilshire Boulevard,
Los Angeles 36, California,

Attorneys for Appellant.

FILED

FEB 14 1952

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D.

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No. 13120

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TODD C. FAULKNER,

Appellant,

vs.

JOHN T. GIBBS,

Appellee.

REPLY BRIEF OF APPELLANT.

Remarks Re: Appellee's Statement of the Case.

There is no support in the record for appellee's repeated assertions that the infringement herein was wilful, deliberate or wanton. Original Finding XIII quoted by appellee does not support said assertions. It merely states that the appellant's Fawn game was "derived" from a game of Loeff in Long Beach, which had been copied from a Gibbs game in Santa Monica. Said Loeff game had been operating in Long Beach for over three years before Faulkner built his Fawn game in 1944.

There is no evidence whatsoever that Faulkner knew Loeff's game was a copy of the Gibbs game, or that he ever heard of Gibbs' patent until he was sued in 1946.

That the changes made by Faulkner from his original game to his modified game were not "inconsequential,"

is shown by the Court holding that said modified game did not infringe three claims infringed by the original game. The modified game was injected into this case at the insistence of undersigned counsel for Faulkner who believed then (and still believes) that said modified game did not infringe *any* of the Gibbs claims. Appellee's innuendoes of bad faith in the appeals are unwarranted and unsupported.

Appellee's assertions that Faulkner failed to keep records of his Fawn game business are direct misstatements. Throughout his deposition, Faulkner repeatedly stated that he employed a bookkeeper, and she could and would explain all the records. See statements at [R. 77, 78, 80, 81, 82, 84, 90] and particularly at [R. 80], "She is our trusted employee. She is a competent bookkeeper," and on [R. 81], "So I put a check system on, and we checked them. Hilda has everything—to check by. We check their receipts and it is a double check on them every day." And see page 11 of appellee's brief calling attention to the deposition of Hilda Potter where all the books and records were displayed to Mr. Herzig.

With respect to Gibbs' guesses as to appellant's income, appellant's complete books and records were made available to appellee on depositions, and there certainly was no burden on appellant to produce evidence to contradict Mr. Gibbs' flights into speculative fancy concerning appellant's income.

With respect to the so-called "three types of proof," offered by Gibbs, only his licenses Exhibits A-1 to A-10 (Type 1), are worthy of the name "evidence." Types 2 and 3 are mere speculative opinions of Gibbs with no basis in fact. They were wishful thoughts enunciated by Gibbs on his deposition.

Summary of Argument.

A.

THE TRIAL COURT WAS CORRECT IN APPLYING THE REASONABLE ROYALTY RULE OF DAMAGES HEREIN, AND IN USING THE LICENSE AGREEMENTS, APPELLEE'S EXHIBITS A-1 TO A-10 IN DETERMINING THE ROYALTY; BUT THE COURT MISINTERPRETED SAID AGREEMENTS AND REACHED A WRONG RESULT.

1. The Loeff Agreement Exhibit A-10, Is the Best Evidence Before the Court as to a Reasonable Royalty Herein.
2. Of Agreements, Exhibits A-1 to A-9, Only Exhibit A-9 Is Helpful in Ascertaining a Reasonable Royalty in This Case.
3. Neither of Said License Agreements Supports the Judgment Below.

B.

THAT THE JUDGMENT BELOW IS NOT SUPPORTED BY THE RECORD, IS MANIFEST FROM THE MANY ADMISSIONS INHERENT IN APPELLEE'S BRIEF.

1. Appellant's Analyses of Appellee's Written License Agreements, Exhibits A-1 to A-10, Showing That They Do Not Support the Judgment, Stand Uncontradicted and Therefore Admitted.
2. Appellee's Reliance on His Oral Licenses Is an Admission That His Written Licenses Exhibits A-1 to A-10 Do Not Support the Judgment.
3. Appellee's Reliance on a Wholly Fictitious Value for the Long Beach License (Different From That Set Forth in the Loeff Agreement) Is an Admission that his License Agreements Do Not Support the Judgment.

4. Appellee's Reliance on His Unsupported Speculations as to Appellant's Possible Income Is an Admission That Appellee's License Agreements Do Not Support the Judgment.
5. Appellee's Position That He Is Entitled to More Than a Reasonable Royalty Is an Admission That the Court's Finding as to the Royalty Is Not Supported by the Evidence.
6. Appellee's Assertion (Unsupported in the Record) That the Infringement Herein Was Wilful and Wanton Is an Admission That the Judgment Below Is Excessive Unless It Is Deemed to Include Punitive as Well as Compensatory Damages, But No Award of Punitive Damages Was Made by the Court.
7. Appellee's Request That This Court Increase the Judgment Is an Admission That the Judgment Below Cannot Be Supported on Its Merits.

C.

USING THE BEST EVIDENCE AVAILABLE HEREIN, TO-WIT: THE LOOFF LONG BEACH AGREEMENT, EXHIBIT A-10, AS A BASIS FOR COMPARISON, THE REASONABLE ROYALTY ASSESSABLE TO APPELLANT IS ONLY \$806.00 PER YEAR, MAKING THE TOTAL JUDGMENT \$4,433.00.

D.

THERE IS NO SUPPORT IN THE RECORD FOR APPELLEE'S ASSERTION IN POINT II OF HIS BRIEF THAT APPELLANT EITHER DELIBERATELY INFRINGED OR FOLLOWED OBSTRUCTIONIST TACTICS HEREIN.

ARGUMENT.

A.

The Trial Court Was Correct in Applying the Reasonable Royalty Rule of Damages Herein, and in Using the License Agreements, Appellee's Exhibits A-1 to A-10 in Determining the Royalty; But the Court Misinterpreted Said Agreements and Reached a Wrong Result.

We concur with the statement by appellee on page 5 of his Brief, that "Prior to the 1946 amendment to R. S. 4921, there were many Court decisions approving an established royalty as a measure of damages against infringers," that "*the general principles involved were carried over into the amendment.* * * * and that what is reasonable royalty may be determined by reference to existing license agreements."

We further concur with appellee's statement on page 6 of his Brief that "what constitutes a reasonable royalty under the *new law* seems to be based upon the same principles as the determination of reasonable royalty for the purpose of fixing damages under the *old law*. Thus an established royalty actually in effect between the patentee and one or more licensees has frequently been accepted as reasonable royalty";

Such is our case here.

Appellee has introduced into evidence ten written license agreements, Exhibits A-1 to A-10, inclusive, covering various parts of the country, which agreements have been fully analyzed in our Opening Brief. The only

other evidence before the Court is appellee's uncorroborated statement that he had several *oral* licenses, but no details other than the alleged royalty rates were given, although it is inferable that at least two of these, if any there were, involved games much larger than those operated by appellant.

Clearly, as between the complete *written* agreements in evidence, and the alleged indefinite and uncorroborated *oral* agreements, the former are the best evidence, and must control in any conflicts there between.

1. The Loeff Agreement Exhibit A-10, Is the Best Evidence Before the Court as to a Reasonable Royalty Herein.

The Loeff Long Beach license Exhibit A-10, is the only one of all appellee's licenses that is in the same amusement zone as appellant's operations. Exhibits A-1 to A-9 were all in the East, and were for different types of climates and conditions.

The Loeff agreement is therefore the best evidence before the Court relative to the question of "Reasonable Royalty," *but only when carefully scrutinized and analysed for what the parties actually agreed to,*—which was quite different from what they recited in the written instrument.

Although this agreement purports to "establish" a \$3,000.00 per year royalty, *in fact*, it only established an average royalty of \$1,611.00 per year for Loeff's two locations. Since appellant only operated one location, his royalty on the basis of the Loeff agreement is \$806.00 per year, rather than the \$3,000.00 found by the Trial Court.

2. Of Agreements Exhibits A-1 to A-9, Only Exhibit A-9 Is Helpful in Ascertaining a Reasonable Royalty in This Case.

As pointed out in Sections II and IV of our Opening Brief, all of the Eastern licenses, other than the O'Brien New England license, are inapplicable to our problem here for one reason or another. Since none of these other licenses calls for a royalty in excess of \$2,000.00 per year, there appears to be no controversy with respect thereto.

3. Neither the Loeff nor the New England Agreements Support the Judgment Below.

As above pointed out, the Loeff Agreement, covering a total period of nine years, 1941-1950, provides an average royalty of only \$1,611.00 per year, for two locations of 32 units each, *whereas appellant operated but one establishment of 32 units*. The New England agreement with O'Brien, covered three separate establishments of 50 units each, for an average of \$1,200.00 royalty per year per establishment, or a per unit royalty of \$24.00 as compared to \$25.00 for Loeff.

Obviously, neither of these agreements is support for the Trial Court's finding that \$3,000.00 per year would have been a reasonable royalty for appellant to pay if he and appellee had freely negotiated a license.

B.

That the Judgment Below Is Not Supported by the Record, Is Manifest From the Many Admissions Inherent in Appellee's Brief.

Appellee's brief is significant not for what it says, *but for what is left unsaid, and for its implications*. It being clear that Exhibits A-1 to A-10 are the only credible evidence before the Court, appellee's renunciation of said exhibits in favor of uncorroborated, indefinite, oral testimony, and tenuous legal theories amounts to a blanket admission that the judgment below finds no support in appellee's said license agreements, Exhibits A-1 to A-10.

1. **Appellant's Analyses of Appellee's Written License Agreements, Exhibits A-1 to A-10, Showing That They Do Not Support the Judgment, Stand Uncontradicted and Therefore Admitted.**

Appellee devotes but a single sentence (pp. 6, 7) to our analysis, stating merely that we are in error, and that the licenses show the figure of \$3,000.00 per year to be "approximately" correct. *Nothing is said in substantiation of his bald statement!*

Appellee then proceeds to call attention to his oral testimony as to his so-called "basis" used in granting licenses, although admittedly numerous licenses were granted on *other* bases. Appellee's silence as to his written agreements, Exhibits A-1 to A-10, is a clear admission that they do not support his judgment.

2. Appellee's Reliance on His Oral Licenses Is an Admission That His Written Licenses Exhibits A-1 to A-10 Do Not Support the Judgment.

If appellee could show that *even one of his written licenses* averaged \$3,000.00 per year for an installation comparable to appellant's, his comments on his *oral licenses* could at least be considered cumulative, even though very weak.

But when there is not one statement in Appellee's Brief tending to show that his written agreements, Exhibits A-1 to A-10, support the judgment below, his reliance on his alleged oral agreements is a clear admission that, weak as they are, they are the best evidence he can muster to try and support his judgment.

3. Appellee's Reliance on a Wholly Fictitious Value for the Long Beach License (Different From That Set Forth in the Loeff Agreement) Is an Admission That the License Agreements Do Not Support the Judgment.

What appellee really thinks of the ability to support his judgment of his written license agreements, Exhibits A-1 to A-10, is best demonstrated by his statement on page 7 of his Brief, that:

"For appellee's purpose, the licenses may all be disregarded in favor of Mr. Gibbs' opinion [R. 41] that the location was worth about \$10,000.00 per year license fee."

In other words, appellee, by his silence relative to his written licenses, together with the above assertion, states as plainly as possible, that he has no confidence in his license agreements to support his judgment, and seeks to rely on his own opinion of a higher value, based on purely hypothetical grounds.

If Exhibit A-10 had any probative value in support of the judgment, appellee certainly would not assert his opinion in conflict therewith.

4. Appellee's Reliance on His Unsupported Speculations as to Appellant's Possible Income, Is an Admission That Appellee's License Agreements Do Not Support the Judgment.

The situation here is substantially the same as in paragraph 3 above. On pages 3 and 4 of his Brief, appellee postulates *his opinion on what Faulkner might have received* in the operation of his Fawn games, and on page 7 he proposes this heady theory of recovery in lieu of that used in his license, Exhibits A-1 to A-10.

Could there be any clearer admission that appellee's license agreements do not support his judgment? If they do, why does he decline to point out, at least briefly, *how just one such agreement* serves as a legitimate basis for the Court's findings?

5. Appellee's Contention That Under the Statute He Is Entitled to More Than a Reasonable Royalty, Is an Admission That the Court's Finding Relative to a Reasonable Royalty Is Not Supported by the Evidence.

Finding No. VI states in part as follows:

"The Court finds that a *reasonable royalty* to be paid by defendant to plaintiff Gibbs for infringement of his Letters Patent as hereinbefore found, would be the amount of *average royalty* paid by several licensees to Gibbs under the license agreements referred to in paragraph I of these findings, *and also the amount of average royalty paid by licensee Loeff* for the years 1948 and 1949, namely, Three Thousand (\$3,000.00) Dollars per year."

How could the Trial Court have stated any more clearly or positively that it was attempting to follow the reasonable royalty rule, but that the Court was under the misapprehension that the license agreements provided for a royalty of \$3,000.00 per year. (As we have shown, however, none of appellee's Exhibits A-1 to A-10 do so.)

Appellee must have grave doubts as to the soundness of Finding VI, or he would not stress the contention in pages 5 to 9 of his Brief that the 1946 statute "authorized judgment for general damages" *not less than* a reasonable royalty. And that (p. 8), while the Trial Court chose \$3,000.00 per year as "an established royalty * * * *it was not bound to do so.*"

Appellee recognizes that the judgment is excessive, and is trying to lay a foundation for arguing that the judgment (contrary to the Court's express statement) includes something in addition to a "reasonable royalty." This is, of course, contrary to the facts and untenable.

6. **Appellee's Assertion (Unsupported in the Record) That the Infringement Herein Was Wilful and Wanton, Is an Admission That the Judgment Below Is Excessive Unless It Is Deemed to Include Punitive as Well as Compensatory Damages, But No Award of Punitive Damages Was Made by the Court.**

Appellee, realizing that our figure of \$4,433.00 is rational, reasonable, and the maximum to which he is entitled as *compensatory damages* under the statute, seeks to inject a new factor into the case, *i. e.*, punitive damages based on his *unsupported allegations* of wilful infringement in order to make up the difference between \$4,433.00 and the \$15,000.00 award given him by the Trial Court. *This of course is improper, since the Trial Court expressly awarded compensatory damages only,*

and by its failure to find that appellee was entitled to any increase thereof, denied punitive damages in a judgment which is now final and unappealable by appellee.

7. Appellee's Request That This Court Increase the Judgment Is an Admission That the Judgment Below Cannot Be Supported on Its Merits.

Appellee's request that this Court increase the judgment appears to be a smoke-screen raised on the theory that the best defense is a strong offense.

It is axiomatic that no modification of a judgment can be made on appeal in favor of a party not appealing therefrom. *Absent a notice of appeal, the Circuit Court has no jurisdiction*, and this is just as true with respect to an appellee who fails to file a cross-appeal, as it is with any other party as to whom the judgment has become final.

A cross-appeal is necessary in order to assert points which go beyond a mere support of the judgment below.

"Thus it was stated in *Arkansas Fuel Oil Co. vs. Leisk*, 133 F. 2d 69, that in the absence of a cross-appeal, *appellee may not attempt either to enlarge his rights* under the judgment appealed from, or to lessen the rights of his adversary."

10 Cyc. of Fed. Proc. 697.

It was said in *Swig v. Tremont Trust Co.* (1st Cir.), 8 F. 2d 943, 945, as follows:

"But the trust company did not except to this ruling, so far as the record shows, *and has filed no cross-appeal* and assignment of errors complaining of it. We are therefore of the opinion that this question is not before us."

And see also:

Neece v. Durst, 61 F. 2d 591 (C. C. A. 9).

C.

Using the Best Evidence Available Herein, To-wit: the Loeff Long Beach Agreement, Exhibit A-10, as a Basis for Comparison, the Reasonable Royalty Assessable to Appellant Is Only \$806.00 Per Year, Making the Total Judgment \$4,433.00.

The Loeff agreement, on its face, was made with this present litigation in mind, for it recited in paragraph 6 thereof, that Gibbs would immediately bring suit against Faulkner, the appellant herein.

The provision of paragraph 5 that the last two installment payments of \$3,000.00 were to be considered royalty for the last two years, is of course pure window dressing in anticipation of the day when Gibbs might get a judgment against Faulkner, and could then use the Loeff agreement to "establish" a fictitious royalty to be presented to the Court herein as a measure of damages.

However, as we have seen, the total consideration paid by Loeff for his nine years of operations was only \$14,500.00 (exclusive of his contributions to the cost of this suit) which makes an average royalty of only \$1,611.00 per year for the full term of the license. Obviously, the rights granted to Loeff were no more valuable the last two years of the agreement than they were during earlier years, and hence on its face, the agreement was a collusive attempt by appellee and Loeff to create a picture which would allow Gibbs to request, as he has here done, an excessive award of damages.

In summary, it is thus seen with respect to appellee's Point I that it contains facts indicating seven separate admissions of the unsupportability of the judgment below on the basis used by the Trial Court, *i. e.*, on the "reason-

able royalty rule.” It would seem clear that appellee has in effect conceded the correctness of our position that the judgment should be reduced to \$4,433.00.

D.

There Is No Support in the Record for Appellee’s Assertion in Point II of His Brief That Appellant Either Deliberately Infringed, or Followed Obstructionist Tactics Herein.

This matter of the alleged deliberateness of appellant’s actions was discussed earlier herein. Suffice it to say at this point, that there is no evidence in the record indicating that appellant herein has done more than defend himself against an ordinary patent suit, raising the usual defenses and taking the allowable appeals.

If a defendant is an obstructionist, merely because he avails himself of counsel’s advice, and pursues all defenses and appeals open to him in an honest endeavor to prove the justice of his cause, then the fundamentals of our jurisprudence are in a sad shape indeed.

There is in this case nothing whatsoever that brings it within the rule of this Circuit recently laid down in the case of *Park-In Theatres v. Perkins*, 190 F. 2d 137, 90 USPQ 163, wherein this Court said with respect to the allowance of attorneys’ fees in patent cases:

“But in granting this power, Congress made plain its intention that such fees be allowed *only in extraordinary circumstances*. * * *

“Thus, the payment of attorneys’ fees for the victor *is not to be regarded as a penalty* for failure to win a patent suit. The exercise of discretion in favor of such an allowance should be bottomed upon a *finding of unfairness or bad faith* in the conduct

of the losing party, or some other equitable consideration of similar force, which makes it *grossly unjust* that the winner of the particular law suit be left to bear the burden of his own counsel fees which prevailing litigants normally bear. The cases support this view.” (Emphasis added.)

The *Park-In* case was followed recently by this Court in the case of *Day-Brite Lighting v. Ruby Lighting* (decided August 9, 1951), 91 USPQ 225.

We agree with appellee that “attorneys’ fees in patent cases should be the exception and not the rule.” We do not however, believe that this case comes within the exception of the above-cited cases, which have been reported since the decision of the Trial Court herein.

It is believed that if the hearing in this case had been subsequent to the above cited cases, Judge Yankwich would not have allowed any additional attorneys’ fees to appellee herein.

Respectfully submitted,

FULWIDER & MATTINGLY,

ROBERT W. FULWIDER,

By ROBERT W. FULWIDER,

Attorneys for Appellant.

No. 13122

**United States
Court of Appeals**
for the Ninth Circuit.

UNITED STATES OF AMERICA, R. P. JANDL,
as Administrator of the Estate of William F.
Leland, Deceased, and C. W. BREAKIRON,
Successor Receiver for Atlantic and Pacific
Airlines,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY,
LIMITED; ORION INSURANCE COM-
PANY, LIMITED; THE DRAKE INSUR-
ANCE COMPANY, LIMITED, Subscribing
Underwriting Members of Lloyd's, London,

Appellees.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 270)

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

JAN - 9 1952

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. **CLERK**

No. 13122

**United States
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UNITED STATES OF AMERICA, R. P. JANDL,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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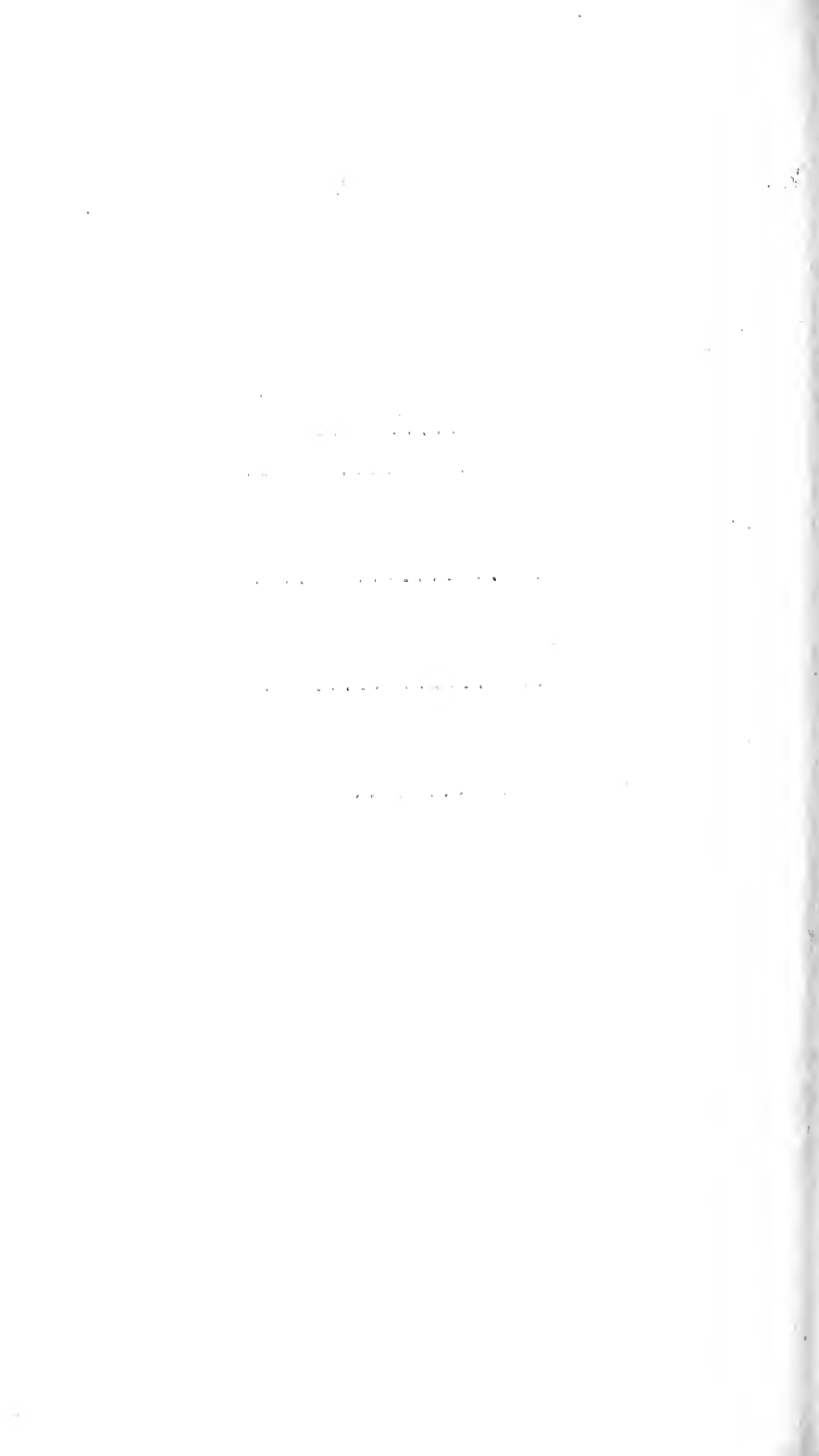
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NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS,

1017 U. S. Court House,
Seattle 4, Washington,

Attorney for Appellant, United States of
America.

ROLLA V. HOUGHTON, and

JACK R. CLUCK, of

HOUGHTON, CLUCK, COUGHLIN & HENRY,

535 Central Building,
Seattle 4, Washington,

Attorneys for Appellants, R. P. Jandl, as
Administrator of the Estate of William
L. Leland, Deceased, and C. W. Break-
iron, Successor Receiver for Atlantic and
Pacific Airlines.

JULIAN O. MATTHEWS,

BEVERLY S. WILKERSON, and

WARD L. SAX, of

MACBRIDE, MATTHEWS & HANIFY,

812 Hoge Building,
Seattle 4, Washington,

Attorneys for Appellees.



In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2401

THE UNITED STATES OF AMERICA and
R. P. JANDL, as Administrator of the Estate
of WILLIAM F. LELAND, Deceased,

Plaintiffs,

vs.

EAGLE STAR INSURANCE COMPANY, LIM-
ITED; ORION INSURANCE COMPANY,
LIMITED; THE DRAKE INSURANCE
COMPANY, LIMITED, Subscribing Under-
writing Members of Lloyd's, London,

Defendants.

COMPLAINT

Plaintiffs allege:

I.

Plaintiff R. P. Jandl is the duly qualified and acting Administrator of the Estate of William F. Leland (hereinafter called Leland) deceased, appointed in Probate Cause No. 109506 in this court, and brings this action pursuant to court order duly entered in that cause.

II.

Each of the defendants above named is an alien and is a subscribing underwriting member of Lloyd's, London, under Lloyd's Certificate

W-OMA-253, Lloyd's, London, being a copartnership or unincorporated association engaged in the business of writing insurance in King County, Washington. Exclusive of interest and costs, the matter in controversy exceeds the sum of \$3,000.00.

III.

On July 21, 1948, the defendants, through the office of D. K. MacDonald & Company of Seattle, Washington, issued to Leland Certificate No. W-OMA-253, including endorsements numbered 1 to 6, inclusive, attached thereto and forming a part thereof, insuring one certain Douglas DC-3 airplane, No. NC 79025 against accidental loss of or damage to the aircraft while on flight or on the ground, including any equipment or accessories while attached to and forming a part of the aircraft, as set forth in the certificate, a copy of which is hereto attached marked Exhibit A and made by this reference a part hereof. At the time of the accident hereinafter referred to all premiums on such certificate were fully paid, and it was in full force and effect. At all times herein mentioned Leland was the owner of the aircraft described in and covered by the certificate above mentioned.

IV.

At all times herein mentioned the plaintiff United States of America was holder of a note the payment of which was secured by a mortgage covering the above-described aircraft. Said mortgage is referred to and described in that certain creditor's claim filed in the estate of Leland by the Government, a copy

of which claim is marked Exhibit B and attached hereto. Since that claim was filed defendants have made a payment to the United States of America of \$3,305.33 which was applied on the principal amount of the note on August 19, 1949. The unpaid principal balance now owing on the note is \$1,906.24 and there is also owing \$24.09 interest which accrued to January 2, 1949; 4 per cent interest on the sum of \$5,211.57 from January 3, 1949, to August 19, 1949, and 4 per cent interest on \$1,906.24 from August 20, 1949, until paid.

Under the insurance certificate, loss resulting from loss or damage to the aircraft insured is payable to the Treasurer of the United States for the account of all interests.

V.

On January 2, 1949, the aircraft above referred to crashed and burned in an attempted takeoff at Boeing Field, King County, Washington, resulting in the complete destruction of such aircraft and of all equipment and accessories attached thereto and forming a part thereof, except for salvage from all of the foregoing to the value of \$390.20. The actual agreed value of the aircraft, as provided in the certificate above mentioned, was \$25,000.00.

VI.

On January 5, 1949, which was as soon as practicable after the accident above mentioned, plaintiff R. P. Jandl through his attorneys gave written notice thereof to D. K. MacDonald & Company,

Hoge Building, Seattle 4, Washington, on behalf of the estate of Leland, who was killed in the accident above mentioned; a copy of such notice is attached hereto as Exhibit C and made by this reference a part hereof. Although plaintiffs made repeated demands on the defendants for payment of the sum due on the certificate, defendants have failed and refused to pay any part thereof other than the \$3,305.33 payment to the United States of America mentioned above. The sum now due, after deducting this \$3,305.33 payment, the salvage value of \$390.20, and the amount of \$1,250.00 deductible under the certificate, is \$20,054.47, with interest thereon at the rate of 6 per cent per annum from January 2, 1949.

Wherefore, plaintiffs pray for judgment against the defendants and each of them in the sum of \$20,054.47, plus interest thereon at six per cent (6%) from January 2, 1949, until paid, and for their costs and disbursements herein.

/s/ J. CHARLES DENNIS,
U. S. District Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for
R. P. Jandl, Administrator.

State of Washington,
County of King—ss.

R. P. Jandl, being first duly sworn, upon oath deposes and says: I am one of the plaintiffs above named. I have read the foregoing Complaint, know the contents thereof and believe the same to be true.

/s/ R. P. JANDL.

Subscribed and sworn to before me this 17th day of October, 1949.

[Seal] /s/ PAUL COUGHLIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed October 19, 1949.

[Title of District Court and Cause.]

ANSWER

Come now the defendants and in answer to the complaint of the plaintiff herein, admit, deny and allege as follows:

I.

Answering Paragraph I of said complaint, defendants admit that R. P. Jandl is the duly qualified and acting administrator of the Estate of William F. Leland, deceased. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph and therefore deny the same.

II.

Answering Paragraph II of said complaint, defendants admit that they are the subscribing underwriters under Lloyd's certificate W-OMA-253, that said defendants are subjects of the British Empire, and that exclusive of interest and costs the matter in controversy exceeds the sum of \$3,000.00. Except as herein specifically admitted, defendants deny each and every other allegation contained in said paragraph.

III.

Answering Paragraph III of said complaint, defendants admit that on July 21, 1948, they issued certificate W-OMA-253 to William F. Leland insuring one certain Douglas DC-3 airplane No. NC 79025 as provided in said certificate and admit that Leland was the owner of the aircraft described in said certificate. Except as herein specifically admitted, defendants deny each and every other allegation contained in said paragraph.

IV.

Answering Paragraph IV of said complaint, defendants admit that the plaintiff, United States of America, was the holder of a note the payment of which was secured by a mortgage covering the hereinbefore described aircraft, that said mortgage is referred to and described in that certain creditor's claim filed in the Estate of William F. Leland by the United States of America, and that the defendants have made a payment to the United States of America in the amount of \$3,305.33 under said

certificate of insurance and particularly under Endorsement No. 6 which provides that:

“In case of loss or damage on account of or during a breach of any warranties and/or conditions of this policy and/or security instruments with respect to aircraft in the custody or possession of the purchaser, this policy shall, nevertheless, fully cover the United States of America, acting by and through the War Assets Administrator, against loss or damage covered by any of the perils insured against, but the liability of the insurer for any such loss shall not exceed the unamortized balance due on any chattel mortgage or on any note or security instrument, less unearned interest and unpaid installment due prior to the date of the loss or accident, if any, after the United States of America, acting by and through the War Assets Administrator, has exhausted all reasonable means to reduce such balance by attempting to collect amounts due from the purchaser and/or such other securities as they may have.”

Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph and therefore deny the same.

V.

Answering Paragraph V of said complaint, defendants admit that on January 2, 1949, the aircraft above referred to crashed and burned in an attempted takeoff at Boeing Field, King County,

Washington, and that said aircraft suffered severe damage as the result of such happening and admit that the actual and agreed value of said aircraft is as provided in said certificate of insurance. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph and therefore deny the same.

VI.

Answering Paragraph VI of said complaint, defendants admit that on January 5, 1949, plaintiff R. P. Jandl, through his attorneys, gave written notice of the accident to D. K. MacDonald & Company, Hoge Building, Seattle 4, Washington, on behalf of the estate of Leland, who was killed in the accident above mentioned, and that a copy of such notice is attached to the complaint as Exhibit C. Defendants also admit that they denied liability because of said happening under said certificate of insurance for other than the sum of \$3,305.33, which has heretofore been paid to the plaintiff United States of America. Except as herein specifically admitted, the defendants deny the allegations contained in said paragraph, and specifically deny that the sum of \$20,054.47 or any other greater or lesser sum is due to the plaintiffs from these defendants.

For further answer to said complaint and by way of affirmative defense thereto, defendants allege:

I.

That said policy under "General Conditions," paragraph 3, further provides:

"3. The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the aircraft sustaining damage covered by this certificate and/or policy, the assured or his/their accredited agents shall forthwith take such steps as may be necessary to insure the safety of the damaged aircraft and its equipment and accessories."

That at the time of the takeoff and crash hereinabove referred to, said assured failed and neglected to use due diligence and do and concur in doing all things reasonably practicable to avoid said crash and the damage to said airplane in the following particulars:

1. That said assured caused said airplane to be loaded in excess of the maximum takeoff weight limit permitted by the operation limitations of said airplane and the rules and regulations of the Civil Aeronautics Authority covering the carrying of passengers in planes of the type insured under said policy.

2. That said assured permitted an accumulation of ice and frost upon wings of said aircraft, which

condition increased the basic empty weight of said aircraft and decreased the lifting qualities of its wings, rendering said airplane dangerous and unsafe to fly and notwithstanding full knowledge of the existence of said ice and frost upon the wings of said aircraft, said assured and his authorized agents and employees permitted and directed the attempted takeoff and flying of said airplane at the time of the crash hereinabove referred to.

3. That said assured and his authorized agents and employees permitted and directed the attempted takeoff and flying of said airplane at a time when they knew or in the exercise of due diligence should have known that conditions of visibility and weather were below the minimum requirements of the Civil Aeronautics Authority for the type of airplane described in said policy and the type of operation which the assured was conducting and at a time when visibility and weather conditions were such as to make a takeoff dangerous and unsafe.

II.

That said policy under "General Conditions," paragraph 2, provides as follows:

"The aircraft shall be operated at all times in accordance with the operations authorized as set forth in the operations record of the aircraft."

That said assured violated and disregarded the above-quoted condition of said policy in that said airplane at the time of said crash and during the

takeoff immediately preceding said crash was loaded in excess of the maximum takeoff load permitted by the operations record and limitations of said aircraft; that the lifting qualities of its wings were decreased by the accumulation of ice and frost on said wings, which conditions existed at the time of takeoff and continued up to the time of the aforesaid crash.

III.

That said policy under "General Conditions," paragraph 1, further provides:

"1. At the commencement of each flight, the aircraft shall have a valid and current airworthiness certificate issued by the Civil Aeronautics Authority. The requisite log books shall be kept fully completed and up to date and such documents shall be produced to D. K. MacDonald & Company for Underwriters at any reasonable time should they so require in support of all or any claims hereon."

That at the time of the takeoff and crash of the airplane hereinabove referred to, said assured violated and disregarded the terms and conditions of said policy as set forth in said paragraph in the following particulars:

1. That the certificate of airworthiness issued to said assured covering the insured airplane provides that said aircraft "is considered airworthy when operated in accordance with the applicable aircraft operation limitations and maintained in accordance with the Civil Air Regulations"; that said airplane

was not so operated by the assured at the time of the takeoff and crash hereinabove referred to in that by reason of an overload placed upon said airplane by the assured the takeoff weight of said airplane exceeded the permissible and authorized takeoff weight as set forth in the operation limitations of said plane; that the ice and frost which the assured permitted to accumulate on the wings of said plane in addition to increasing the weight of the airplane, decreased the lifting qualities of the wings and in effect changed the overall basic design thereof; that the violation by the assured of said airworthiness certificate rendered said airplane unairworthy and invalidated and suspended during the existence of said violations said airworthiness certificate.

2. That the assured failed and neglected to keep fully completed and up to date the log books of said airplane as required by the regulations of the Civil Aeronautics Authority.

IV.

That said policy further provides:

“General Exclusions

“This certificate and/or policy does not cover:

“1. Any loss, damage or liability arising from:

* * *

“(b) The use of the aircraft for any purpose or piloting by any person other than for the purposes and by the pilot or pilots described in the Schedule, or outside the geographical

limits named therein, unless due to force majeure."

In the operation of said plane on the date of the accident, the operations department of the assured had made provision to change crews at a point distant more than 8 hours from Seattle; that assured violated Civil Air Regulations in that the contemplated flight to the point where the crew would be changed required three qualified pilots whereas only two qualified pilots were on board; that the defendant operated this flight within the purview of exclusion No. 1 set forth in the policy in that the assured, W. F. Leland, was the third pilot on board and was not approved by the insurers as required under the terms of the policy.

V.

That said policy contains the following provisions:

"General Exclusions

"This certificate and/or policy does not cover:

"1. Any loss, damage or liability arising from:

* * *

"(c) The use of the aircraft for closed course racing or student instructions unless such use is specifically approved in the Schedule or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of D. K. MacDonald & Company for the Underwriters."

That at the time of said takeoff and crash, said

plane had not been lined and upholstered with fire resistant materials as required by the regulations of the Civil Aeronautics Authority; that to fly said airplane without complying with said regulations required a waiver from the Civil Aeronautics Authority; that the assured had not at the time of said takeoff and crash or at any time prior thereto obtained the consent of D. K. MacDonald & Company for the Underwriters to so operate said airplane as required by the above-quoted provisions of said certificate and/or policy; that assured violated the above exclusion in that said airplane at the time of takeoff was overloaded, had ice and frost on its wings that aggravated the overloading condition as well as decreased the lifting qualities of its wings; and that said plane took off under weather conditions below minimum for a non-scheduled carrier and was in violation of Civil Aeronautics Regulations in respect to the necessary pilot qualifications required under the conditions of flight herein and in violation of Civil Aeronautics Regulations in connection with the airworthiness certificate, all of which matters are hereinafter more particularly set forth and alleged herein, and in connection with which matters no waiver was issued by the Civil Aeronautics Authority and with reference to which at no time did D. K. MacDonald & Company for the Underwriters give their written consent.

VI.

That the defendants, notwithstanding the foregoing breaches and violations of the terms and con-

ditions of said certificate, have by reason of Endorsement No. 6 attached to said policy (mortgagee endorsement) paid to the plaintiff United States of America the sum of \$3,305.33, which is the entire unamortized balance due the United States of America on its said note and mortgage less unearned interest and unpaid installments due prior to the attempted takeoff and crash of said airplane on January 2, 1949.

VII.

That by reason of the foregoing, plaintiffs are not entitled to recover under said certificate or policy of insurance.

Wherefore, having fully answered, defendants pray that plaintiffs take nothing by their complaint herein and that the defendants have and recover of and from the plaintiffs their costs and disbursements herein.

/s/ JULIAN O. MATTHEWS,

Of Macbride, Matthews & Hanify, Attorneys for Defendants Eagle Star Insurance Company, Limited; Orion Insurance Company, Limited; The Drake Insurance Company, Limited; Subscribing Underwriting Members of Lloyd's, London.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 29, 1949.

[Title of District Court and Cause.]

REPLY

Plaintiffs make the following reply to defendants' affirmative defense:

I.

Replying to Paragraphs I, II, IV and V of the affirmative defense, plaintiffs admit that the policy contains the language quoted therein. Plaintiffs deny each and every other allegation of those paragraphs.

II.

Replying to Paragraph III of the affirmative defense, plaintiffs admit that the policy contains the language quoted therein. Referring to the allegation in subdivision 1 of Paragraph III of the affirmative defense relating to alleged language of the certificate of airworthiness, plaintiffs do not have information sufficient to enable them to determine the truth or falsity thereof and therefore deny the same. Plaintiffs deny each and every other allegation of Paragraph III.

III.

Replying to Paragraph VI of the affirmative defense, plaintiffs admit that defendants paid to plaintiff United States of America \$3,305.33, which is the entire and amortized balance due the United States of America on its note and mortgage, less unearned interest and unpaid installments due prior to January 2, 1949. Plaintiffs deny each and every other allegation of Paragraph VI.

IV.

Replying to Paragraph VII of the affirmative defense, plaintiffs deny each and every allegation thereof.

/s/ J. CHARLES DENNIS,
U. S. District Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for R. P. Jandl,
Administrator.

State of Washington,
County of King—ss.

R. P. Jandl, being sworn, says: I am one of the plaintiffs above named; I have read the foregoing Reply, know the contents thereof and believe the same to be true.

/s/ R. P. JANDL.

Subscribed and sworn to before me this 24th day of February, 1950.

[Seal] /s/ ROLLA V. HOUGHTON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 2, 1950.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION
UNDER RULE 36

Defendants Eagle Star Insurance Company, Limited; Orion Insurance Company, Limited; The Drake Insurance Company, Limited, subscribing underwriting members of Lloyd's, London, request plaintiffs The United States of America and R. P. Jandl, as Administrator of the Estate of William F. Leland, Deceased, within ten days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following statements is true:
 - a. That the airplane described in plaintiff's complaint No. NC 79025 was licensed under Department of Commerce Civil Aeronautics Administration Certificate of Airworthiness (Form A.C.A. 1362) which provides: "This aircraft has been inspected by a representative of the Administrator and is considered airworthy when operated in accordance with the applicable aircraft operation limitations and maintained in accordance with the civil air regulations."
 - b. That on January 2, 1949, Form A.C.A. 309, Department of Commerce, Civil Aeronautics Administration, "Aircraft Operation Record" had been replaced for airplanes licensed under Form A.C.A. 1362 by Form A.C.A. 309a, Department of Commerce, Civil Aeronautics Administration, "Opera-

tion Limitations.” That each of said forms prescribed a maximum permitted takeoff weight for the airplane for which such form was made out.

c. That under the “Operation Limitations” prescribed on Form A.C.A. 309a by the Civil Aeronautics Administration for airplane No. NC 79025 the maximum permitted takeoff weight for said airplane when carrying passengers was 25,346 pounds.

d. That the dry weight of airplane No. NC 79025 without passengers, baggage, fuel or lubricating oil at the time of the attempted takeoff described in the complaint was 17,696 pounds.

e. That there were 30 persons including passengers and crew members aboard airplane No. NC 79025 at the time of the attempted takeoff described in the complaint.

f. That at the time of the attempted takeoff described in the complaint, airplane No. NC 79025 was engaged in “instrument flight operations” as defined in Section 42.36 of Title 14, 1949 Edition of Code of Federal Regulations.

g. That a Department of Commerce, Civil Aeronautics Administration Flight Plan form signed by Chavers, pilot of airplane No. NC 79025 at the time of the takeoff described in the complaint was filed on behalf of the decedent Leland to cover the intended flight which ended in crash at the Interstate Airways Communication Station, Boeing Field, containing the following information: Aircraft identification number, 79025; color of aircraft, silver; name of pilot, Chavers; pilot’s or flight comman-

der's address, Des Moines, 4442; certificate number of pilot or flight commander, 124873; point of departure, Seattle; cruising altitudes and route to be followed, 9,000, green area 2 to Helena, route area No. 48 to Livingston, green 2 to Billings; first point of intended landing, Billings; proposed true air speed at cruising altitude, 165 miles per hour; proposed time of departure 1945 subsequently corrected to 2100; actual time of departure, blank; estimated elapsed time, 4 hours, 15 minutes; alternate airport, Helena; fuel on board, 600 gallons; transmitting frequency, 3105, 6210; and that the statements of intention therein contained were true statements of intention as to said flight and that the statements of fact therein contained were true statements of fact pertaining to the attempted takeoff and flight described in the complaint herein.

h. That at the time of the attempted takeoff described in the complaint, the visibility at Boeing Field was reported by the U. S. Weather Bureau to be one-fourth mile.

i. That a few minutes before the attempted takeoff described in the complaint the airport traffic controller in the tower at Boeing Field told the pilot of No. NC 79025 over the radio that the visibility was one-fourth mile.

j. That the propeller log books for airplane No. NC 79025 contained no entries pertaining to the propellers installed on said airplane at the time of the attempted takeoff described in the complaint and if said log books had been kept up to date there would have been entries therein pertaining to the propellers thereon.

k. That the last entry in the engine log books for airplane No. NC 79025 was made April 21, 1948, and did not pertain to either engine installed on said airplane at the time of the attempted takeoff described in the complaint and if said log books had been kept up to date there would have been entries therein pertaining to the engines thereon.

l. That the last inspection notation in the aircraft log for airplane No. NC 79025 was made January 13, 1947, and the last trip notation therein was October 22, 1948, and if said log book had been kept up to date there would have been subsequent entries therein.

m. That only two pilots permitted to fly airplane No. NC 79025 under the provisions of the insurance policy described in the complaint were on board at the time of the attempted takeoff described in the complaint and that said pilots were scheduled to fly said airplane for more than 8 hours without a rest period during the 24 hours after the takeoff described in the complaint.

n. That on January 2, 1949, at the time of the attempted takeoff described in the complaint, William F. Leland was operating airplane No. NC 79025 under operating certificate No. 7-73 issued by the Department of Commerce, Civil Aeronautics Administration, which authorized him to conduct non-scheduled air carrier operations in multi-engine land airplanes.

o. That at the time of the attempted takeoff described in the complaint the decedent Leland had not modified said airplane to meet the fireproofing

standards established by the regulations of the Civil Aeronautics Administration and that said regulations required the fireproofing standards to be complied with by November 1, 1948, unless a waiver as to compliance was obtained by said date.

p. That in accordance with special regulation No. 309 of the Civil Aeronautics Administration the decedent Leland applied to the Civil Aeronautics Administration for a waiver as to his complying with the requirement that he modify airplane No. NC 79025 to meet the fireproofing standards of the Civil Aeronautics Administration regulations prior to November 1, 1948, which waiver was granted and was in force and effect on January 2, 1949.

q. That neither the decedent Leland nor anyone in his behalf applied to D. K. MacDonald & Company or received from D. K. MacDonald & Company consent to operate airplane No. NC 79025 while said waiver was in force and effect.

/s/ JULIAN O. MATTHEWS,

Of Macbride, Matthews & Hanify, Attorneys for Defendants Eagle Star Insurance Company, Limited; Orion Insurance Company, Limited; The Drake Insurance Company, Limited, Subscribing Underwriting Members of Lloyd's, London.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 8, 1950.

[Title of District Court and Cause.]

AMENDED COMPLAINT

First Claim

Plaintiffs allege:

I.

Plaintiff R. P. Jandl is the duly qualified and acting Administrator of the Estate of William F. Leland, deceased, appointed in Probate Cause No. 109506 in the Superior Court of the State of Washington for King County, and brings this action pursuant to court order duly entered in that cause.

II.

Each of the defendants above named is an alien and is a subscribing underwriting member of Lloyd's, London, under Lloyd's Certificate W-OMA-253, Lloyd's, London, being a copartnership or unincorporated association engaged in the business of writing insurance in King County, Washington. Exclusive of interest and costs, the matter in controversy exceeds the sum of \$3,000.00.

III.

On July 21, 1948, the defendants, through the office of D. K. MacDonald & Company of Seattle, Washington, issued to William F. Leland Certificate No. W-OMA-253, including endorsements numbered 1 to 6 inclusive attached thereto and forming a part thereof, insuring one certain Douglas DC-3 airplane #NC 79025 as set forth in the certificate, a copy of which is hereto attached marked Exhibit

A and made by this reference a part hereof. At the time of the accident hereinafter referred to all premiums on such certificate were fully paid, and it was in full force and effect. At all times herein mentioned William F. Leland was the owner of the aircraft described in and covered by the certificate above mentioned.

IV.

At all times herein mentioned the plaintiff United States of America was holder of a note, the payment of which was secured by a mortgage covering the above-described aircraft. The note and mortgage are referred to and described in that certain creditor's claim filed in the Estate of William F. Leland by the Government, a copy of which claim is hereto attached marked Exhibit B and made by this reference a part hereof. Since that claim was filed defendants have made a payment to the United States of America of \$3,305.33 which was applied on the principal amount of the note on August 19, 1949. The unpaid principal balance now owing on the note is \$1,906.24 and there is also owing \$24.09 interest which accrued to January 2, 1949, 4% interest on the sum of \$5,211.57 from January 3, 1949, to August 19, 1949, and 4% interest on \$1,906.24 from August 20, 1949, until paid.

Under the insurance certificate, loss resulting from loss or damage to the aircraft insured is payable to the Treasurer of the United States for the account of all interests.

V.

Plaintiff C. W. Breakiron is the duly qualified and acting Successor Receiver for Atlantic and Pacific Airlines, appointed in the case of Andrew J. Burke v. Lester Lamb, Cause No. 68884, District Court of Galveston County, Tenth Judicial District, State of Texas, and joins in this action pursuant to court order duly entered in that cause. At all times herein mentioned plaintiff and his predecessors and assignors held, and plaintiff now holds, a note, the payment of which was secured by a mortgage covering the above-described aircraft. The note and mortgage are referred to and described in that certain creditor's claim filed by plaintiff's predecessor as receiver for Atlantic and Pacific Airlines in the Estate of William F. Leland. A copy of that claim is hereto attached marked Exhibit C and made by this reference a part hereof. The unpaid principal amount now owing on the note is \$9750.00. There is also owing interest in the sum of \$325.01 to December 31, 1948, and interest at 4% on the sum of \$9750.00 from January 1, 1949, until paid. Plaintiff asserts a legal and equitable lien, subject only to the prior lien of the United States of America, on the proceeds of the insurance above referred to by virtue of the following provision of the mortgage held by him:

“Mortgagors do further covenant and agree:

“(1) That they will procure and maintain, at their cost, hull insurance on the Aircraft

written under the standard "All Risks, Ground and Air" form, or under a "Named Perils, Ground and Air" form providing substantially the same coverage, with such companies, and in such amounts, as shall be satisfactory to the Mortgagee; that all such policies of insurance shall provide by appropriate endorsement that all proceeds and sums recoverable thereunder shall be paid exclusively to the Mortgagee for the account of all interests; that all proceeds paid or recovered under such policies of insurance shall at the option of the Mortgagee, be applied toward the payment of indebtedness (in which event any excess remaining after such payment shall be paid to the Mortgagors or whosoever may be entitled to receive same), or toward the repair or replacement of the Aircraft, and if such proceeds and sums are to be used for said repair or replacement, the Mortgagee shall make available for such purposes such portion of the proceeds received by the Mortgagee that is so required (any proceeds not so expended to be applied on the indebtedness); that all property acquired in replacement, as aforesaid, shall be subject to the obligations, covenants and conditions of this Mortgage; that the acceptance by the Mortgagee of a policy or policies of insurance containing provisions for amounts to be deductible from settlements of loss claims shall in no way limit the Mortgagors' liability under paragraph 3 below."

The insurance referred to in paragraph III above is the only insurance which was procured by the Mortgagees covering the type of loss dealt with in the mortgage covenant referred to above.

VI.

On January 2, 1949, the aircraft above referred to crashed and burned in an attempted takeoff at Boeing Field, King County, Washington, resulting in the complete destruction of such aircraft and of all equipment and accessories attached thereto and forming a part thereof, except for salvage from all of the foregoing to the value of \$390.20. The actual agreed value of the aircraft, as provided in the certificate above mentioned, was \$25,000.00.

VII.

On January 5, 1949, which was as soon as practicable after the accident above mentioned, plaintiff R. P. Jandl through his attorneys gave written notice thereof to D. K. MacDonald & Company on behalf of the Estate of William F. Leland, who was killed in the accident above mentioned; a copy of such notice is attached hereto as Exhibit D and made by this reference a part hereof. Although plaintiffs made repeated demands on the defendants for payment of the sum due on the certificate, defendants have failed and refused to pay any part thereof other than the \$3,305.33 payment to the United States of America mentioned above. The sum now due, after deducting that \$3,305.33 payment, the salvage value of \$390.20, and the amount

of \$1,250.00 deductible under the certificate, is \$20,054.47, with interest thereon at the rate of 6% per annum from January 2, 1949.

Second Claim

Plaintiff R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, alleges:

I.

Realleges paragraphs I, II and III of the First Claim herein.

II.

The aircraft referred to in the First Claim herein crashed during the attempted takeoff referred to in Paragraph VI of that Claim into what is known as a revetment hangar at Boeing Field, owned by King County, Washington. On or about June 16, 1949, King County filed a creditor's claim in the Estate of William F. Leland, claiming damage to the hangar in the amount of \$2566.70. Plaintiff duly notified defendants of the filing of that claim and defendants refused to recognize it as a claim for which they were liable under the Certificate of insurance. Thereupon plaintiff disallowed the claim and King County commenced action to recover the amount of this damage in the Superior Court of the State of Washington for King County, in a cause entitled King County v. R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, Cause No. 413677. Plaintiff tendered defense of that action to defendants herein and the tender was refused. Thereupon, plaintiff

undertook defense of the action and so notified defendants herein and also notified them that their refusal to defend the action was considered a breach of the insurance contract above referred to and that they would be held liable for all damages resulting from that breach, including attorneys' fees and all other expenses of defending the action. The action was tried in due course and the court held King Coutny to be entitled to judgment against the Estate of William F. Leland, deceased, for damage caused to its revetment hangar in the amount of \$2,566.70 and costs of suit. In defending the action plaintiff incurred expense in the amount of \$34.90 for filing fees and witnesses and the further expense of employing attorneys to defend the action. A reasonable fee for the services performed by plaintiffs' attorneys in defending the action is \$1,000.

Defendants have denied liability for payment of any of the above amounts.

Wherefore, plaintiffs pray:

1. For judgment against the defendants and each of them on the First Claim herein in the sum of \$20,054.47, plus interest thereon at six per cent (6%) from January 2, 1949, until paid.

2. For judgment in favor of plaintiff R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, against the defendants and each of them on the Second Claim herein in the sum of \$3,601.60.

3. For their costs and disbursements herein and such other and further relief as to the court may seem proper.

/s/ J. CHARLES DENNIS,
United States District
Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for R. P. Jandl, as Administrator of the
Estate of William F. Leland, Deceased, and
C. W. Breakiron, as Successor Receiver for
Atlantic and Pacific Airlines.

EXHIBIT A

In Consideration of an Additional Premium of
\$35.00 Plus \$2.45 Taxes:

It is hereby agreed and understood that the following terms and conditions shall become a part of this certificate and/or policy.

Loss Payable:

Loss, if any under Section 1—"Loss or Damage to Aircraft" of this certificate and/or policy shall be payable to the Treasurer of the United States for the account of all interests.

Breach of Warranty:

In case of loss or damage on account of or during a breach of any warranties and/or conditions of this policy and/or security instruments with respect

to aircraft in the custody or possession of the purchaser, this policy shall, nevertheless, fully cover the United States of America, acting by and through the War Assets Administrator, against loss or damage covered by any of the perils insured against, but the liability of the insurer for any such loss shall not exceed the unamortized balance due on any chattel mortgage or on any note or security instrument, less unearned interest and unpaid installment due prior to the date of the loss or accident, if any, after the United States of America, acting by and through the War Assets Administrator, has exhausted all reasonable means to reduce such balance by attempting to collect amounts due from the purchaser and/or such other securities as they may have.

This policy shall cover aircraft located within the United States, but this policy shall not be vitiated or affected as far as the interest of the United States of America, acting by and through the War Assets Administrator, is concerned if without the consent of the United States of America, acting by and through the War Assets Administrator, such aircraft are taken out of the jurisdiction of the United States of America nor shall any act or omission to act by any parties insured hereunder other than the United States of America, acting by and through the War Assets Administrator, vitiate or in any manner affect the coverage hereunder of the United States of America, acting by and through the War Assets Administrator; nor shall the coverage be vitiated or af-

fectured as far as the United States of America, acting by and through the War Assets Administrator, is concerned by any statements or warranties of purchasers or any other parties not true to fact, provided that such misrepresentations are not known to the United States of America, acting by and through the War Assets Administrator prior to loss, if any.

Cancellation of Policy :

This policy shall be cancelled at any time at the request of the insured and/or the United States of America, acting by and through the War Assets Administrator, but only upon surrender of the original policy or a lost policy release or receipt executed by the Insurance Division, War Assets Administrator, in which case the company shall refund the excess of paid premium above the customary short rate premium for the expired term to the Treasurer of the United States, or his order, for the account of all interests. This policy may be cancelled at any time by the company by giving to the assured and the Insurance Division, War Assets Administration, Washington 25, D. C., thirty (30) days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired term which excess, if not tendered shall be refunded on demand. Notice of Cancellation shall state that excess premium, if not tendered, will be refunded on demand. Notice of Cancellation mailed to the address of the

assured stated in the policy and the Insurance Division, War Assets Administration, Washington 25, D. C., shall be sufficient notice. The company shall not be liable for any return premium in respect to an aircraft on which a total loss has been paid.

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By

Endorsement No. 6

Any Service of Suit clause contained in the policy and/or certificate to which this endorsement is attached is void and the following clause applies:

“Suit and Service of Process Clause
On Surplus Line Policies”

“As provided by Section .15.15 of the Insurance Code of the State of Washington, upon any cause of action arising out of this policy in the State of

Washington, action against the underwriters shall be brought, if at all, in the Superior Court of the county in which such cause of action arose. Service of legal process against the underwriters may be made in any such action by service upon the Insurance Commissioner, and the Insurance Commissioner shall mail process so served, or a true copy thereof, by prepaid registered mail with return receipt requested, to the following person, who is hereby designated by the underwriters as their representative for the purpose: Morrell P. Totten, 618 Second Avenue, Seattle, Washington. The Underwriters shall have forty (40) days from date of service upon the Commissioner within which to plead, answer, or otherwise defend the action.

“If any such action is brought against any one or more of the Underwriters named in this policy all Underwriters so named will abide by the final decision of such court or of any appellate court in the event of an appeal.”

This contract is registered and delivery by D. K. MacDonald & Company as a surplus line coverage under the insurance code of the State of Washington, enacted in nineteen hundred and forty-seven.

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July 21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By,

Endorsement No. 5

Component Parts

1. Subject to all the provisions, conditions and limitations of the policy to which this endorsement is attached and of which it forms a part, it is hereby understood and agreed that the Company's liability for loss or damage to any of the component parts of the aircraft bearing Certificate Number shall not exceed the amount shown opposite each of the component parts listed below. The Assured agrees that each amount includes all costs of materials and parts required for replacement, possible transportation charges and all labor and other costs incidental to the repairs and replacement of the parts:

Propeller	5	% of insured value
Engine	20	% "
Fuselage	15	% "
Landing Gear (& Pontoons) .	15	% "
Center Section.....	7	% "
Left Wing.....	14	% "

Right Wing.....	14 %	of insured value
Ailerons @ ea., in all...	8 %	"
Fin	2.2%	"
Rudder	2.2%	"
Stabilizer	4.4%	"
Elevators @ ea., in all..	2.2%	"
All instruments.....	10 %	"
All Else.....	6 %	"

Notwithstanding the fact that the total of the amounts set forth above exceeds the declared value of the Aircraft as set forth in Column 8, page 1, of the Schedule of this Certificate and/or Policy, it is expressly understood and agreed that the Company's liability as respects the aforesaid aircraft shall be limited to the declared value of the Aircraft.

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By,

Endorsement No. 4

Notwithstanding anything contained herein to the contrary, it is hereby declared and agreed that the coverage afforded by this policy does not apply whilst the insured aircraft is/are being used for crop dusting, seeding, spraying or hunting from the aircraft.

All Other Terms and Conditions Remain Unchanged Attached to and forming part of Certificate No. W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July 21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By

Endorsement No. 3

Anything to the contrary notwithstanding, it is hereby understood and agreed that:

(1) Ground and mooring risks as insured by "Section 1—Loss or Damage to Aircraft" of this Certificate and/or Policy shall cover taxiing (i.e., while the aircraft is moving under its own power or momentum but not included under the definition of flight risks.)

(2) Deductible under ground and mooring risks shall be as follows:

- (A) Taxiing (if included).....\$1250.00
- (B) Windstorm or Hail on
Unhangared Aircraft.....\$ 250.00
- (C) Fire or Theft..... Nil
- (D) All Else\$ 250.00

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By,

Endorsement No. 2

“In compliance with numbered line 7 of the schedule of this certificate and/or policy, it is hereby understood and agreed that the following are approved first pilots of the aircraft insured hereunder while holding valid pilot's airman certificates and proper ratings issued by the Civil Aeronautics Authority for the kind of flying performed and the aircraft type and horsepower:

Karl Christiansen
I. H. Mansfield
Joe M. Halsey
Merle F. Edgerton
Elmer Kangas
Donald Orcutt
James Cook
William H. Maxwell
Thomas M. Hoyt
Walter Keith
William B. Rutherford
Perry S. Cole
James S. Boyd
Ned B. Van Amburg
Herbert Strouss

It is further understood and agreed that any co-pilot is approved providing said co-pilot possesses a valid pilot's airman certificate and proper ratings issued by the Civil Aeronautics Authority for the kind of flying performed and the aircraft types and horsepower; and provided further that the approval granted herein is in effect only during such periods as an approved first pilot, possessing full Civil Aeronautics Administration Authority required qualifications is in charge of, and riding in, a pilot's seat of the aircraft.

All Other Terms and Conditions Remain Unchanged
Attached to and forming part of Certificate No.
W-OMA-253.

Issued to: W. F. Leland.

The Effective Date of This Endorsement Is: July
21, 1948.

SUBSCRIBING UNDERWRITING MEMBERS
OF LLOYD'S, LONDON, by

D. K. MacDONALD &
COMPANY,

By,

Endorsement No. 1

D. K. MACDONALD & COMPANY

SEATTLE 1, U. S. A.

has on the request of the Assured procured insurance as hereinafter specifying from subscribing

UNDERWRITERS AT LLOYD'S, LONDON

hereinafter called the Underwriters and in consideration of the premium for the agreement contained in the Schedule the Underwriters do hereby agree to insure the Assured against the risks specified in the Schedule against Accident Loss, Damage and or Liability subject to the terms, conditions and exclusions set forth in the Schedule herein or endorsed hereon, as hereinafter set forth in respect of Aircraft described in the Schedule occurring during the term of this Certificate and or Policy

SCHEDULE

1. Name of Assured: **W. F. LELAND**
2. Address of Assured: **806 1/2 FIELD, SEATTLE, WASHINGTON**
3. Certificate Term: From **JULY 21, 1948 - 12-01 AM** to **JULY 21, 1949 - 12-01 AM**
4. Assured's Business or Profession is: **— AIRCRAFT OPERATORS —**
5. Assured's interest in the Aircraft is that of **— OWNER —**

6. Description of Aircraft, Value(s), Limit(s) of Liability, Premium(s)

AIRCRAFT DESCRIPTION SERIAL NUMBER	YEAR MFG	TYPE	AIRCRAFT SERIAL NUMBER	PER CENT (Est)	ENGINE(S) MAKE AND H P	AGREED VALUE
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
MC 79085		DOUGLAS DC 3	1942 LAMPLANE	— — — —	28 2 PWR 1050	\$25,000

AIRCRAFT DESCRIPTION MAKE AND NUMBER	SECTION 1 LOSS OR DAMAGE TO AIRCRAFT	SECTION 2—THIRD PARTY LIABILITY										PREMIUM CHARGE
		COVERAGE A PUBLIC LIABILITY (Existing Passenger)		COVERAGE B PROPERTY DAMAGE		COVERAGE C PASSENGER LIABILITY		COVERAGE D PROPERTY DAMAGE		COVERAGE E PASSENGER LIABILITY		
Column 8	Column 9	Per Person	Accident Column 11	One Accident Column 12	One Accident Column 13	One Accident Column 14	One Accident Column 15	One Accident Column 16	One Accident Column 17	One Accident Column 18	One Accident Column 19	
MC 79085	\$1750.00 \$1750.00 \$1750.00										\$2215.00 \$2215.00 \$2215.00	

PREMIUM TAXES	\$1750.00	PREMIUM TAXES	\$2215.00
	\$1750.00		\$2215.00
	\$1750.00		\$2215.00

7. Policy AS APPROVED BY D. K. MACDONALD BY ENDORSEMENT HEREON.

8. Purpose for which the Aircraft will be used **PRIVATE BUSINESS AND PRIVATE PLEASURE FLIGHTS AND COMMERCIAL OPERATIONS INCLUDING PASSENGER AND FREIGHT FLIGHTS FOR HIRE OR RENTING.**

SCHEDULE A

9. Geographical Limits **UNITED STATES (EXCLUDING ALASKA) AND NOT EXCEEDING 100 MILES INTO MEXICO OR CANADA.**

[illegible]

- [illegible]

DePaul University

Can. Assn. of Broadcasters v. Canada (Att. Gen.), [1992] 1 S.C.R. 1, 100 D.T.R. 101 (S.C.).

GENERAL INDEX

- [illegible]

GENERAL CONDITIONS

1. At the same time, it is clear that the American and Soviet sides could not agree on the question of the future of the Baltic states. The Soviet side was not prepared to accept the American position on the future of the Baltic states.
2. The American side was not prepared to accept the Soviet position on the future of the Baltic states.
3. The American side was not prepared to accept the Soviet position on the future of the Baltic states.
4. The American side was not prepared to accept the Soviet position on the future of the Baltic states.
5. The American side was not prepared to accept the Soviet position on the future of the Baltic states.
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7. The American side was not prepared to accept the Soviet position on the future of the Baltic states.
8. The American side was not prepared to accept the Soviet position on the future of the Baltic states.
9. The American side was not prepared to accept the Soviet position on the future of the Baltic states.
10. The American side was not prepared to accept the Soviet position on the future of the Baltic states.

EXHIBIT B

In the Superior Court of the State of Washington
for the County of King, in Probate

No. 109506

In the Matter of

THE ESTATE OF WILLIAM F. LELAND,

Deceased.

CREDITOR'S CLAIM

Claim is herewith presented against the estate of
said deceased as follows:

Estate of William F. Leland

To United States of America, acting by and through
the War Assets Administrator, Dr.:

This claim is founded upon a promissory note dated July 22, 1946, in the original principal amount of \$17,000, wherein Andrew J. Burke was maker and claimant herein was payee. Payment of said note was secured by a chattel mortgage covering one Douglas Aircraft, Model C-47A, Serial No. 10181. By agreement executed by William F. Leland, deceased, on or about July 15, 1948, the said Leland assumed and agreed to pay said note. Said aircraft was almost completely destroyed by fire on January 2, 1949, with the remaining salvage having heretofore been sold by the Administrator of the estate for a net of \$390.20 to which sum the lien of said mortgage attaches.

The unpaid principal balance of said note is \$5,211.57. Interest is owing thereon to January 2, 1949, in the amount of \$24.09. Additional interest accrues on said principal balance from January 2, 1949, at the rate of 4% per annum. The balance due and unpaid on this claim is the sum of \$5,235.66 together with interest on the principal balance of \$5,211.57 at the rate of 4% per annum from January 2, 1949, until paid.

This is a priority claim.

State of Washington,
County of King—ss.

O. C. Bradeen, being first duly sworn, says that he is duly authorized to make this claim on behalf of the claimant; that the amount of said claim, to wit, the sum of \$5,235.66, together with 4% interest on the sum of \$5,211.57 from January 2, 1949, until paid, is justly due said claimant, that no payments have been made thereon which are not credited and that there are no offsets to the same, to the knowledge of affiant.

/s/ O. C. BRADEEN,
Regional Director, Region 11, War Assets Admin-
istration, Seattle, Washington.

Subscribed and sworn to before me this 9th day
of June, 1949.

N. N. VAUGHAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of the foregoing claim is hereby acknowledged this 13th day of June, 1949.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorney for Administrator
of Above-Entitled Estate.

The foregoing claim is Allowed and approved for
\$.

.
Administrator.

The foregoing claim Allowed and Approved for
\$. this day of, 1949.

.
Judge.

EXHIBIT C

In the Superior Court of the State of Washington
for the County of King, in Probate
No. 109506

In the Matter of
THE ESTATE OF WILLIAM F. LELAND,
Deceased.

CREDITOR'S CLAIM

Claim is herewith presented against the estate of
said deceased as follows:

Estate of William F. Leland, Deceased

To Edward W. Watson, Receiver for Atlantic and Pacific Airlines, Dr., 2219 Mechanic Street, Galveston, Texas:

Date: Dec. 31, 1948.	Amount
Items: Balance due under note dated March 7, 1947, payable to Andrew J. Burke and by him assigned to "Edward W. Watson, Receiver for Atlantic & Pacific Airlines."	
Balance of principal due.....	\$9,750.00
Interest to 12/31/48	325.01

The above note was given for purchase of one Douglas DC-3 Aircraft, Serial No. 42-243-19 CAA No. NC-79025, and was secured by chattel mortgage on such aircraft, the original of which was duly recorded with Civil Aeronautics Administration on April 11, 1947, as Document #308271. The mortgage provided that said Aircraft be insured by mortgagor for mortgagee's benefit and this claim is entitled to legal and equitable lien (subject only to prior lien of WAA) on proceeds of insurance Pol. No. W-OMA-253 issued by McDonald & Company for Underwriters at Lloyds, London, which policy insured said Aircraft at time of its destruction. Lien is not waived.

State of Texas,
County of Galveston.

Edward W. Watson, being first duly sworn, says that he is duly authorized to make this claim on behalf of the claimant; that the amount of said claim, to wit: the sum of Ten Thousand Seventy-

five and 01/100 (\$10,075.01) Dollars, is justly due said claimant, that no payments have been made thereon which are not credited and that there are no offsets to the same, to the knowledge of affiant.

EDWARD W. WATSON.

Subscribed and sworn to before me this 9th day of May, 1949.

JANE CROWE,
Notary Public in and for
Galveston County, Texas.

Receipt of the foregoing claim is hereby acknowledged this 12th day of May, 1949.

.....,
Attorney for Administrator
of Above-Entitled Estate.

The foregoing claim is Allowed and approved for
\$.....

.....,
Executor....
Administrat....

The foregoing claim is Rejected this day of
....., 19....

.....,
Executor....
Administrat....

The foregoing claim Allowed and Approved for
\$..... this day of, 19....

.....,
Judge.

EXHIBIT D

January 5, 1949

D. K. McDonald and Company
Hoge Building
Seattle 4, Washington

Re: Policy No. W-OMA-253, Lloyds of London
issued to W. F. Leland, Seattle Air Charter.

Gentlemen:

In accordance with Section 4 of the General Conditions of the above policy we are writing this letter to notify you that the 1942 Douglas DC 3 Landplane, NC 79025 covered by the above policy was wrecked and burned at Boeing Field, Seattle, Sunday night, January 2, 1949.

You are, of course already familiar with this circumstance and we understand from conversations we have had with representatives of Morrell P. Totten & Company that the adjustment of claims has been placed in their hands and that the matter has been under investigation by them since very shortly after the disaster occurred. A representative of their office telephoned us regarding it on the morning of January 3rd and we have had other telephone conversations with representatives of their office since that date.

Twenty-seven passengers and three crew members were aboard the plane at the time it was wrecked. The three crew members and eleven of the passengers were killed and we understand that practically all of the remaining passengers sustained personal injuries.

We understand that the adjustors for the company have all available details regarding the injuries sustained. If any further information is needed, however, please advise us and we will cooperate to the fullest extent and furnish all information that is available to the representatives of the insured.

We are attorneys for the estate of William F. Leland, the insured, who was killed in the accident. Mr. R. P. Jandl has been appointed Administrator of Mr. Leland's estate.

It will be appreciated if you will let us know what proofs are necessary in connection with the insurance on the plane and furnish us necessary blanks for filing proof of claim.

Yours very truly,

R. V. HOUGHTON.

RVH:cs

Copy to: Morrell P. Totten & Co.

Culliton & McDonald, Inc.

[Endorsed]: Filed September 18, 1950.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2401

THE UNITED STATES OF AMERICA and
R. P. JANDL, as Administrator of the Estate
of William F. Leland, Deceased,
Plaintiffs,

vs.

EAGLE STAR INSURANCE COMPANY, LIM-
ITED; ORION INSURANCE COMPANY,
LIMITED; THE DRAKE INSURANCE
COMPANY, LIMITED, Subscribing Under-
writing Members of Lloyd's, London,
Defendants.

ORDER GRANTING LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs' motion for leave to file an amended complaint came on regularly for hearing on September 18, 1950, before the undersigned. Plaintiffs appeared by Rolla V. Houghton, one of their attorneys. Defendants appeared by Julian O. Matthews, one of their attorneys, and resisted the motion.

The court having examined the files of the case and having heard and considered the arguments of counsel, it is ordered that the motion is granted and the clerk of this court is directed to file the amended complaint which is attached to the motion on file herein. Pursuant to oral stipulation of the

parties in open court, it is ordered that the answer to the original complaint shall stand as an answer to the amended complaint; that all new matter in the amended complaint shall be deemed denied and that all affirmative defenses set out in the answer now on file shall apply to the allegations of the amended complaint.

Done in Open Court this 18th day of September, 1950.

/s/ PEIRSON M. HALL,
District Judge.

Presented by:

/s/ R. V. HOUGHTON,
Of Attorneys for Plaintiffs.

Approved as to form:

/s/ JULIAN O. MATTHEWS,
Of Attorneys for Defendants.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

PLAINTIFFS' ANSWER TO DEFENDANTS'
REQUEST FOR ADMISSION UNDER
RULE 36

Plaintiffs make the following answer to defendants' Request for Admission Under Rule 36:

Sections a, b, c, d and e: Plaintiffs admit the truth of the statements contained in the sections of the request designated a, b, c, d and e.

Section f: Plaintiffs cannot truthfully admit or deny the statements contained in Section f of the request for the reason that Sec. 42.36 of Title 14, 1949 Edition of Code of Federal Regulations, does not define "instrument flight operations" and for the further reason that the pilot, the co-pilot and the owner of the plane, who were the only persons who ever knew whether the plane was engaged in instrument flight operations, were killed in the attempted takeoff.

Section g: Plaintiffs admit that a flight plan, as described in Section g was filed as therein alleged. Plaintiffs cannot truthfully admit or deny that the statements of intention therein contained were true statements of intention as to said flight or that the statements of fact therein contained were true statements of fact pertaining to the attempted take-off and flight described in the complaint herein, for the reason that the owner, the pilot and the co-pilot of the plane, who were the only persons who knew whether the statements of fact and of intention were true were killed in the attempted takeoff.

Section h: Plaintiffs cannot truthfully admit or deny the statement contained in this section for the reason that the records of the U.S. Weather Bureau do not show whether, at the time of the attempted takeoff, it reported the visibility at Boeing Field. Plaintiffs admit that the records of the U.S. Weather Bureau show that the visibility from the tower at Boeing Field at the time of the attempted takeoff was one-fourth mile.

Section i: Plaintiffs cannot truthfully admit or

deny the statement contained in Section i, for the reason that they have no personal knowledge regarding the matter, and that the pilot to whom the words were spoken, if spoken at all, is dead, and the truth of the statement can only be determined by evaluating the testimony of such witness or witnesses, if any, as may be able to testify on the subject.

Section j: Plaintiffs cannot truthfully admit or absolutely deny the statements contained in this section. They do deny, on information and belief, each and every statement therein contained. The sources of their information and belief are as follows: The Civil Aeronautics Administration has, in its office in the Exchange Building, Seattle, a file containing photostatic copies of some but not all of the exhibits used at an investigation of the accident in which aircraft NC79025 was destroyed, which investigation was conducted by the Civil Aeronautics Board at Seattle on or about January 18, 1949. Among those photostatic copies are two of what are called "Propeller Logs." These pertain to propellers which were installed on airplane No. NC79025 on March 28, 1948, and contain entries pertaining thereto. The propellers referred to in these logs are of the same make and have the same type hubs as the propellers that were on the plane at the time of the crash, but their serial numbers do not appear in the logs and it is therefore impossible to identify them definitely by the logs as being the same propellers. Plaintiff R. P. Jandl, Administrator, was decedent Leland's audi-

tor continuously from prior to March 28, 1948, to the date of his death and was generally familiar with the details of his business. To the best of his knowledge and recollection, the propellers referred to in the log as having been installed on March 28, 1948, are the same ones that were on the plane at the time of the attempted takeoff described in the complaint. The mechanic who had charge of the maintenance of the plane continuously from prior to March 28, 1948, until its destruction on January 2, 1949, says that his recollection is the same. While the above-mentioned file in the office of the Civil Aeronautics Administration does not contain any original documents or any copies of logs in a form that would ordinarily be referred to as "books," it does contain, in addition to the two propeller logs above mentioned, a photostatic copy of an inspection report dated December 22, 1948, pertaining to aircraft NC79025. Plaintiffs believe and assert that this is actually and legally a part of the log of the plane. It contains references to the propellers that were on the plane at the time of the attempted takeoff described in plaintiffs' complaint and shows, as to each propeller, the make, the number of hours since overhaul, number of hours since last 100-hour inspection and number of hours since last 400-hour inspection.

The reasons plaintiffs cannot absolutely deny the statements contained in Section j are that the plane and nearly all papers aboard it were destroyed by fire on January 2, 1949, at the time Leland, who

personally attended to most of the business connected with the keeping of its logs and records, was killed. On January 3 and 4, 1949, the plaintiff Administrator delivered to a representative of the Civil Aeronautics Administration all available records pertaining to Aircraft NC79025 for the period 1947 and 1948, including all logs, log books and maintenance and operations records that could be found. These were not examined by any of the plaintiffs and none of the plaintiffs have any personal knowledge regarding their contents. They were never returned. After plaintiffs were served with defendants' request for admission under Rule 36 they inquired of the Seattle representatives of the Civil Aeronautics Administration and learned that, as far as can be determined from local sources, all of these documents were sent to Washington, D. C., and deposited there in the record section of the Civil Aeronautics Administration. Plaintiffs can ascertain the contents of these documents, if at all, only by doing the work and incurring the expense involved in trying to get certified copies. Even if they did that, plaintiffs still could not admit or deny with certainty the statements contained in Section j of defendants' request, because the current logs probably were aboard the plane and destroyed in the fire, or may have been lost or misplaced after leaving the plaintiff Administrator's possession.

Section k: Plaintiffs cannot truthfully admit or absolutely deny the statements contained in this section. They do deny, on information and belief,

each and every statement therein contained. The source of their information is the statement of the mechanic who had charge of the maintenance of the plane that engine log books were kept which were substantially current and the general recollection of the plaintiff administrator to the same effect, although neither the administrator nor the mechanic can recall specific dates or entries in the engine log books. The reason no engine log book is available for inspection is the same as that stated in plaintiffs' answer to Section j with regard to propeller log books. There are no copies of engine log books in the file at the office of the Civil Aeronautics Administration referred to in the answer to Section j. The inspection report of December 22, 1948, referred to above in the answer to Section j, and which plaintiffs believe is a part of the log of the plane, contains entries pertaining to the engines which were installed on the plane at the time of the attempted takeoff described in the complaint.

Section 1: Plaintiffs do not know what defendants mean by the words "aircraft log for airplane No. NC79025." If they mean a single book in which all notations pertaining to the airplane were to be made, then plaintiffs cannot truthfully admit or deny the statements contained in Section 1 of defendants' request. The reason for this is that if such a book exists plaintiffs have no knowledge of it or its contents. What is said in the answer to Section j with reference to the disposition and possible destruction of logs and records pertaining to this aircraft applies to the airplane log book, if

there was one. If such a book is in existence then to the best of plaintiffs' knowledge and belief neither the original nor a copy thereof is available for inspection at any point closer than Washington, D. C. There is no such copy in the above-mentioned file at the Seattle office of the Civil Aeronautics Administration, and plaintiffs, after diligent inquiry, have been unable to locate a copy.

Plaintiffs believe that the log for airplane No. NC79025 consisted not of a single book but of separate sheets containing Pilot flight reports, maintenance transcripts, inspection reports and log of pilots' contacts. If this is the meaning of "aircraft log for airplane No. NC79025," plaintiffs deny each and every statement contained in Section 1 of defendants' request. In the above-mentioned file at the Seattle office of the Civil Aeronautics Administration there are photostatic copies of the following documents pertaining to aircraft NC79025: Log of Pilots Contacts for the period December 31, 1948, to January 2, 1949; Inspection reports dated December 22, 1948, and January 2, 1949; and Pilots flight reports and maintenance transcripts dated December 6, 12th, 13th and 14th, 1948.

Section m: Plaintiffs admit that only two pilots permitted to fly airplane No. NC79025 under the provisions of the insurance policy described in the complaint were on board at the time of the attempted takeoff described in the complaint. They deny that said pilots were scheduled to fly said airplane for more than 8 hours without a rest period

during the 24 hours after the takeoff described in the complaint.

Section n: Plaintiffs deny that on January 2, 1949, at the time of the attempted takeoff described in the complaint, William F. Leland personally was operating airplane No. NC79025. They admit that at that time the airplane was being operated for William F. Leland, by his employee, under operating certificate No. 7-73, which was issued by the Department of Commerce, Civil Aeronautics Administration, to William F. Leland and authorized him to conduct non-scheduled air carrier operations in multi-engine land airplanes.

Section o: Plaintiffs admit that at the time of the attempted takeoff described in the complaint the decedent Leland had not modified said airplane to meet all fireproofing standards established by regulation of the Civil Aeronautics Administration. He had completed much of that work but not all of it. Plaintiffs deny defendants' legal conclusion "that said regulations required the fireproofing standards to be complied with by November 1, 1948, unless a waiver as to compliance was obtained by said date."

The regulations referred to are 14 C.F.R., Section 42.10, which established certain fire prevention standards for certain non-scheduled aircraft in passenger service and required compliance on or before November 1, 1948, and Special Regulation, Serial No. SR-329, effective November 1, 1948, 13 F.R. 6537, which, so far as applicable to aircraft No. NC79025, reads:

“Notwithstanding the provisions of Sections * * * 42.10 * * * of this subchapter establishing certain fire prevention standards requiring compliance on or before November 1, 1948, no air carrier shall be held in violation of these requirements prior to December 1, 1948. Upon application by the air carrier prior to December 1, 1948, the Administrator may further authorize an air carrier to operate without full compliance with these requirements where the Administrator finds that the air carrier has made a diligent effort to meet these requirements by November 1, 1948, and that the air carrier has shown that it will comply with these requirements by a date certain; Provided, that no air carrier shall be required to install or maintain smoke or fire detectors, other than heat detectors, unless otherwise directed by the Administrator.”

Section p: Plaintiffs deny each and every statement contained in this section. They admit that in accordance with Special Regulation No. SR-329, referred to above in the answer to Section o, the decedent applied to the Administrator of the Civil Aeronautics Administration for an extension of the time for complying with the fire prevention requirements above mentioned and that such extension was granted for a period of 60 days effective December 1, 1948, and was in force and effect on January 2, 1949.

Section q: Plaintiffs deny defendants' legal con-

clusion that a waiver was in force or effect. They cannot truthfully admit or deny that neither the decedent Leland nor anyone in his behalf applied to D. K. McDonald & Company or received from D. K. McDonald & Company consent to operate airplane No. NC79025 while the time extension referred to in the preceding paragraph of this answer was in force and effect. The reasons plaintiffs cannot truthfully admit or deny this are that they have no personal knowledge or information regarding the matter and have found no record pertaining to it and that the application, if one was made, was probably made personally by the decedent.

/s/ J. CHARLES DENNIS,
United States District
Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for Plaintiffs R. P. Jandl, Administrator
of the Estate of William F. Leland, Deceased,
and C. W. Breakiron, Successor Receiver for
Atlantic and Pacific Airlines.

United States of America,
State of Washington, County of King—ss.

R. P. Jandl, Administrator of the Estate of William F. Leland, deceased, being sworn, says: I am one of the plaintiffs above named; I have read the foregoing Answer to Defendants' Request for Ad-

mission Under Rule 36, know the contents thereof and state the same to be true.

/s/ R. P. JANDL.

Subscribed and sworn to before me this 18th day of September, 1950.

[Seal] /s/ ROLLA V. HOUGHTON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

STIPULATION

In order to facilitate the preparation of evidence for use in the trial of this case, the parties thereto, through their respective attorneys, stipulate and agree as follows:

1. Copies of any records of the United States Civil Aeronautics Board or Civil Aeronautics Administration, or of any papers, plats, photographs, documents or exhibits in the possession of either of those agencies, certified by the person having custody or possession thereof to be true copies of what they purport to be, shall be admissible in evidence in this cause to the same extent as, but no greater extent than, if the originals were identified or the copies offered in evidence were certified

and authenticated in all respects as required by any applicable statute or rule of court.

2. Copies of any records of Yale University or any of its departments, certified to be true copies of such records by any person who certifies that he has custody or possession thereof, shall be admissible in evidence in this cause to the same extent as, but no greater extent than, the original records would be if the official custodian thereof produced them in open court and testified to their genuineness.

3. Counsel for plaintiffs have exhibited to counsel for defendants a photostatic copy of a promissory note for \$18,361.15, dated March 7th, 1947, signed by Robert E. Stone and William L. Leland, payable to Andrew J. Burke, or his order, and assigned by Andrew J. Burke to Edward W. Watson, as Receiver for the Atlantic and Pacific Air Lines, or his successors in office, and a typewritten copy of a mortgage on the face of which is written with pen and ink:

“Copy.

“Mortgage recorded by CAA on April 11, 1947, as Document No. 308271.”

It is agreed that these are true copies of the note and mortgage referred to in Paragraph V of plaintiffs' amended complaint, first claim, and that said copies shall be deemed admissible in evidence herein to the same extent as, but no greater extent than, the originals would be if properly identified and

offered in evidence. Any rights of said receiver under said policy are no greater than the right of the named assured W. F. Leland.

4. Counsel for plaintiffs have exhibited to counsel for defendants certified copies of two orders in Cause No. 68,884 in the District Court, Galveston County, Texas, 10th Judicial District, entitled "Andrew J. Burke vs. Lester Lamb." One of these orders is dated September 7, 1949, and the other is dated December 5, 1949. It is agreed that these are true copies, that any lack of formality in certifying or authenticating them is waived, and that they may be admitted in evidence herein to the same extent and effect as though certified and authenticated in accordance with all statutes and rules of procedure applicable to the admission of such copies as evidence in this court.

5. If either party desires to introduce in evidence at the trial of this cause any part of the records of the Superior Court of the State of Washington for King County in Probate Proceeding No. 109506 entitled: "In the Matter of the Estate of William F. Leland," or in Cause No. 413677 entitled: "King County, a Municipal Corporation of the State of Washington, Plaintiff, vs. R. P. Jandl, as Administrator of the Estate of William F. Leland, Deceased, Defendant," it shall not be necessary for him to procure certified or authenticated copies but he may submit uncertified copies which his counsel declares in open court to be true copies and shall make the original files

available for comparison by counsel for the other side, and if the latter finds them to be true copies he will stipulate in open court that they may be admitted in evidence herein to the same extent as, but no greater extent than, like copies could be if certified and authenticated in accordance with all statutes or rules of procedure applicable to the admission of such copies as evidence in this court.

6. Exhibit A, attached to plaintiffs' amended complaint, is a true copy of Certificate No. W-OMA-253, issued to William F. Leland through the office of D. K. MacDonald & Company, at Seattle, Washington, including endorsements numbered 1 to 6 attached thereto. At the time of the accident referred to in the amended complaint all premiums on said certificate were fully paid.

7. It is stipulated that Exhibits E, F and G, attached hereto, are copies of letters written by plaintiff Jandl's attorneys, Houghton, Cluck, Coughlin & Henry, to defendants' agent D. K. MacDonald & Company regarding the claim and suit of King County, Washington, mentioned in plaintiffs' amended complaint, second claim, paragraph II, and that such copies shall be admissible in evidence to the same extent as, but no greater extent than, the original letters would be if identified and offered in evidence.

8. It is stipulated that defendants rejected the tendered defense of the suit by King County, mentioned in plaintiffs' amended complaint, second claim, paragraph II.

9. Defendants expressly deny that plaintiff Jandl is entitled to recover anything for the services of attorneys employed by him in defending the suit of King County, Washington, mentioned in plaintiffs' amended complaint, second claim, paragraph II. The parties agree, however, that the reasonable value of the services rendered by the attorneys employed by the plaintiff administrator in defending that action was \$500.00, which shall be the amount allowed if the court finds that the administrator is entitled to recover therefor.

10. It is stipulated that Exhibit H attached hereto is a true copy of a letter written by the attorneys for the plaintiff administrator to Merrill P. Totten & Company, Insurance adjusters designated by defendants to represent them in the handling of claims under the policy sued on in this action, and that the same shall be admissible in evidence to the same extent as, but no greater extent than, the original letter would be if identified and offered in evidence.

11. It is stipulated that Exhibit B attached to the amended complaint is a true copy of the creditor's claim that was filed in the Superior Court of the State of Washington for King County by plaintiff United States of America, on June 9, 1949.

12. It is stipulated that Exhibit C attached to the amended complaint is a true copy of a creditor's claim that was filed in the Superior Court of the State of Washington for King County on May 12, 1949.

13. It is stipulated that the plaintiff administrator was authorized to bring this action by an order entered by the Superior Court of the State of Washington for King County in its Probate Proceeding No. 109506 on September 28, 1949.

14. It is agreed that the crash and burning referred to in Paragraph VI of the amended complaint, first claim, resulted in complete destruction of the aircraft except for salvage of the value of \$390.20.

Dated October 6, 1950.

/s/ J. CHARLES DENNIS,
United States District
Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,

By /s/ R. V. HOUGHTON,
Attorneys for R. P. Jandl, as Administrator of the
Estate of William F. Leland, Deceased, and
C. W. Breakiron, as Successor Receiver for
Atlantic and Pacific Airlines.

MacBRIDE, MATTHEWS &
HANIFY,

By /s/ JULIAN O. MATTHEWS,
Attorneys for Defendants.

EXHIBIT E

July 8, 1949

D. K. MacDonald & Company
Exchange Building
Seattle, Washington

Re: Estate of William F. Leland and
Lloyd's of London Policy No. W-OMA-253

Gentlemen:

We are writing to advise you that King County Airport has filed a creditor's claim against the above estate for \$2,684.70.

The basis of \$2,566.70 of this claim is damages alleged to have been done to the revetment hanger of the claimant when the insured plane crashed on January 2, 1949.

We believe this damage is covered by Section 2, Coverage B, of the above policy (Third Party Liability—Property Damage).

We are giving you this notice pursuant to Section 4 of the general conditions of the policy.

Since it is our position that any claim established for this damage will be the obligation of the insurer, we hereby tender the defense of this claim to you and request that you advise us as to any steps you wish the administrator to take regarding it.

Yours very truly,

R. V. HOUGHTON.

RVH:MS

EXHIBIT F

November 4, 1949

D. K. MacDonald & Company
Exchange Building
Seattle 4, Washington

Re: Estate of William F. Leland, Deceased.

Lloyd's of London Policy No. W-OMA-253.

Gentlemen:

On July 8, 1949, we advised you that King County Airport had filed a creditor's claim against the above estate for \$2,684.70, of which \$2,566.70 was a claim for damages alleged to have been done to the revetment hangar of the claimant when the insured plane crashed on January 2, 1949.

You acknowledged that letter on July 11th, advising us that the handling of claims under the policy was being accomplished through Morrell P. Totten & Company and that you were forwarding our letter of July 8th to them for necessary action.

We have heard nothing further from anyone representing the insurance company with regard to this claim.

On September 28th the Administrator endorsed his rejection on the claim, the rejecting the \$2,566.70 thereof representing alleged property damage. Notice of such rejection was given to the county by registered mail as required by state.

On or about October 26th Mr. Jandl, the Administrator, was served with a Summons and Complaint based on the filed and rejected claim. This case is

pending in the Superior Court of the State of Washington for King County and is entitled, King County, a Municipal Corporation of the State of Washington, Plaintiff, vs. R. P. Jandl, as Administrator of the Estate of William F. Leland, Deceased, Defendant.

We are enclosing three copies of this Summons and Complaint.

As we advised you in our letter of July 8th, it is the position of the Administrator that this claim is a responsibility of the insurer under Section 2, coverage b, of the above policy. The defense of the case is hereby tendered to the insurer.

If the insurance company does not assume the defense of the case within the time allowed by the Summons for answering, we will enter an Appearance in the case on behalf of the Administrator in order to prevent the entry of an Order of Default against him. The Administrator will expect the underwriters to pay all expenses incurred by him in defending this suit if the underwriters do not defend it.

We will appreciate being advised promptly of the attitude of the underwriters with regard to defending the claim.

Yours very truly,

R. V. HOUGHTON.

RVH:es

Enclosures

EXHIBIT G

February 1, 1950

D. K. MacDonald & Company
Exchange Building
Seattle 4, Washington

Re: Estate of William F. Leland, Deceased.

Lloyd's of London Policy No. W-OMA-253.

Gentlemen:

On November 4, 1949, we wrote you regarding a suit that has been commenced against R. P. Jandl, Administrator of the above estate, by King County, a municipal corporation of the State of Washington, for alleged damages to the revetment hangar at Boeing Field when the insured plane crashed on January 2, 1949.

On November 16th we wrote Mr. Julian O. Matthews, attorney for the underwriters, advising him that we had served a notice of appearance in the case, but were doing so without prejudice to our right to insist that the underwriters defend the case.

On January 24, 1950, the attorney for the plaintiff wrote us requesting that the answer of the defendant be served and filed so that the case may be noted for trial. We communicated this information to Mr. Matthews and he has indicated that the underwriters do not care to defend the case.

In order that judgment may not be taken by default we are filing an answer and are forwarding a copy thereof to Mr. Matthews with a copy of this letter.

The policy provides that the underwriters will defend, until they elect to pay their limit of liability, in the name of and on behalf of the insured, any claim or suit, whether groundless or not, brought against the insured and in respect of which the insured is entitled to indemnity under the policy.

As we advised you in our letter of November 4th, the Administrator takes the position that this claim is the responsibility of the underwriters under Section 2, coverage b, of the policy, and that it is the duty of the underwriters to defend the claim or settle it. Since they have not elected to do this, the Administrator has employed us to defend the case.

The Administrator considers the failure of the underwriters to defend the case as a breach of the insurance contract and has instructed us to advise you that he expects to hold them liable for all damages resulting from this breach, including attorneys' fees and other expense reasonably and necessarily incurred in defending this action.

Yours very truly,

R. V. HOUGHTON.

RVH:cs

EXHIBIT H

May 13, 1949

Morrell P. Totten & Company
15th Floor, 821 Second Ave. Bldg.
Seattle 4, Washington

Re: Lloyd's Certificate W-OMA-253 on Douglas
DC-3 NC 79025, Estate of William F. Leland.

Gentlemen:

It has been more than four months since the above plane was destroyed and we have had no indication as to when, if ever, settlement can be expected on the above policy.

We feel that the matter has been allowed to run long enough and are writing to advise you that unless your company either pays the policy or gives definite indication of its intention to pay it by May 19, 1949, we expect to apply to the Probate Department of the Superior Court of King County for authority to sue on the certificate.

Yours very truly,

R. V. HOUGHTON.

RVH:cs

[Endorsed]: Filed October 10, 1950.

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated that the names of all passengers who were aboard aircraft No. NC79025 at the time it crashed and burned in its attempted take-off and flight at Boeing Field on January 2, 1949, are as follows:

Adams, Robert R.
Belknap, Charles S.
Brown, Noel L.
Campbell, Donald M.
Franzheim, Harry C., III
Haerle, David B.
Howe, William H.
Knoll, Joseph G.
Liddle, Jack W.
Nilsen, Orville N.
Reese, Asbjorn G.
Schaak, John C.
Thompson, Theodorus A. A.
Young, Roger W.
Anderson, Thomas H.
Bjork, Richard E.
Bryan, James L.
Cole, George M.
Garrett, Don L.
Hartley, Wallace
Kendall, John W., Jr.
Laird, Ralph D.
Lynch, Donald F.

Palmer, Russell H.
Roderick, John R.
Smith, James W.
Wickman, Leonard B.

Dated this 11th day of October, 1950.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,
Attorneys for R. P. Jandl, as Administrator of the
Estate of William F. Leland, Deceased, and
C. W. Breakiron, as Successor Receiver for
Atlantic and Pacific Airlines.

/s/ JULIAN O. MATTHEWS,
Attorneys for Defendants.

[Endorsed]: Filed October 11, 1950.

[Title of District Court and Cause.]

COURT'S OPINION

On January 2, 1949, there was in effect a Lloyd's policy of insurance, Certificate No. W-OMA-253, on Douglas DC-3 airplane #NC 79025, insuring one Leland, the owner, as the assured, under said policy against accident, loss, damage and/or liability in respect to said aircraft, subject, however, to the terms, conditions and limitations contained in the policy.

On said January 2, 1949, the aircraft was wrecked and except as to small salvage was totally destroyed, and the assured Leland was killed, in an attempted flight take-off at Boeing Field, Seattle.

In this case, all of the above-named plaintiffs have joined in one complaint their several claims under the policy against the defendant insurers.

Plaintiff Jandl as administrator of the assured Leland's estate brings the principal one of such joined actions on the policy to recover the aircraft's full insured value (less realized salvage and a mortgage policy benefit already paid to plaintiff United States) in the net sum of \$20,054.47 and interest.

The plaintiffs United States and C. W. Breakiron in their said joined claims assert (1), independently of the policy provisions, certain mortgage and creditor rights against the Leland estate and further assert (2), as against any such policy net proceeds as may be recoverable on behalf of assured Leland or his estate, certain policy proceeds mortgage rights which, according to the opening statement stipulation of counsel for all plaintiffs and defendants, are no greater and no less than the assured's rights under the policy, because such policy proceeds mortgage rights derive only from the assured's policy rights, and said mortgage rights are the only policy rights claimed by plaintiffs United States and C. W. Breakiron.

From a preponderance of the evidence the Court is of the opinion and decides:

Paragraph 3 of the General Conditions of the policy provided:

“The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the aircraft sustaining damage covered by this certificate and/or policy, the assured or his/their accredited agents shall forthwith take such steps as may be necessary to insure the safety of the damaged aircraft and its equipment and accessories.”

That W. F. Leland, the assured, the owner of the insured aircraft, personally failed to use due diligence, and failed to do and failed to concur in doing all things reasonably practicable, to avoid or diminish the loss of or damage to the insured aircraft on January 2, 1949, when said aircraft was wrecked in an attempted take-off from Boeing Field, Seattle, in that said assured Leland negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions and when said insured aircraft had ice and snow on its surfaces and had icicles hanging to its under surfaces, all of which conditions made it extremely unsafe to fly said aircraft and of all said conditions said assured owner personally was forewarned and had personal knowledge.

That such attempted take-off in flight so caused by said assured owner resulted in wrecking and

destroying said insured aircraft and in the death and injury of a number of persons then on said aircraft, all of which results were proximately caused by such failure to use due diligence and by such failure to do and to concur in doing all things reasonably practicable to avoid or diminish the loss of or damage to the insured aircraft in violation by said assured owner of the express terms and conditions of the insurance contract.

That plaintiffs are not entitled to recover any relief prayed for in their amended complaint and plaintiffs' actions herein should be dismissed with prejudice.

The foregoing is not to be regarded as the judgment or order of the Court, but it is directed that, pursuant to the foregoing, counsel for defendants prepare and serve on opposing counsel forms of findings of fact, conclusions of law and judgment, and present such forms to this Court for settling and entering on July 23, 1951, at 2 o'clock p.m., when counsel on all sides will be heard in respect thereto, and the clerk is directed to withhold the entry of the Court's judgment herein until further order.

/s/ JOHN C. BOWEN,

United States District Judge.

[Endorsed]: Filed July 13, 1951.

REPORTER'S TRANSCRIPT OF EXCERPT
FROM RECORD RE ALLEGATIONS OF
PARAGRAPH IV, OCT. 10, 1950

Mr. Houghton: The next paragraph, paragraph 4, makes allegations with regard to this claim of the Government, and that the insured paid a certain portion of it. The defendants admit that down to the part which refers to the unpaid balance due the Government, and the defendants state that as to that they have no knowledge. Is that correct?

Mr. Matthews: Our position in connection with that matter is this, Mr. Houghton, and I believe we are in agreement upon it: that under the mortgagee endorsement we have paid to the Government all sums which the Government would be entitled to irrespective of policy violations, and that the Government's claim as to any balance which may be due is no greater than the rights of Mr. Leland, since we have paid everything that would be due under the mortgagee endorsement which would protect the Government in the event there were violations.

Mr. Houghton: I think that is true. I think that particular stipulation about the rights of the mortgagee not rising above those of the mortgagor was made with regard to the second mortgage and not the Government's mortgage, and, of course, the Government would be the one that would have to say whether its mortgage rises higher or not. However, it would be my opinion at this time that it does not.

Mr. Matthews: Our allegations in our answer are sufficient to set forth our position.

Mr. Houghton: Yes, I think so.

Mr. Dennis: You don't deny that this amount is due on the note?

Mr. Matthews: We don't know as to that, but we are advised and we understand the facts to be that the underwriters of Lloyds and the other defendants paid to the United States Government the unamortized balance due on its claim. That is everything that the United States, acting through the War Assets Administration, claimed that was owed in any event, irrespective of violations of the policy by the assured, and this balance which is due would only be the sums which the Government would be entitled to receive in the event it was established that there were no policy violations.

Mr. Houghton: I think that is true. We have checked it and it is our opinion that the insurers paid the Government the amount that was due under that endorsement on the policy, and it would be our opinion, the same as Mr. Matthews', that the Government has the same rights now as the Leland estate so far as the balance owing.

Mr. Matthews: And no greater rights.

Mr. Houghton: I don't think that the amount that is owing on this mortgage under those circumstances really makes any difference to the defendants, because whatever goes to the Government, if any, comes out of any recovery to Leland. I was wondering if counsel for defendants would be willing to stipulate that the rest of that paragraph is

true, that is, that the amount still owing to the Government by Leland is as alleged in the amended complaint. If not, we have the administrator here and are prepared to prove it, and he can tell counsel that those statements are true, that that is the unamortized balance of the Government's claim.

Mr. Matthews: Yes, Mr. Houghton, to expedite the trial we are willing to stipulate that the amount set forth is the correct balance, provided it is understood that the Government stands in exactly the same position as the assured stands as far as recovery in respect to policy violations.

Mr. Houghton: We are willing to stipulate to that. I think the Government is.

Mr. Dennis: That is correct.

Mr. Houghton: That means that the whole of paragraph IV is admitted.

The Court: Is that the attitude of all litigants, the last statement?

Mr. Dennis: Yes, your Honor.

Mr. Houghton: Yes, your Honor. There are only three sets of counsel actually represented.

The Court: I understand it to be now the admission of all litigants in this case that the allegations of paragraph IV are true?

Mr. Matthews: Except with the question of interest, your Honor. It is our position that this being an unliquidated claim, the interest would not begin to run until the judgment is entered, but as to the principal balance, which I understood counsel was talking about, that, we believe, is correct and are willing to so stipulate.

Mr. Houghton: And simply leave the question of interest to be decided as a question of law by the Court.

The Court: Is this another way of stating what counsel have just said about paragraph IV: all allegations in paragraph IV admitted except as to when interest begins to run, plaintiffs contending that the time of the beginning of the running of interest is as alleged in that paragraph, and defendants contending that such interest does not begin to run until this Court's judgment, if any, against defendant is entered.

Mr. Matthews: That is agreeable.

Mr. Houghton: Yes, your Honor. Paragraph V alleges that——

[Endorsed]: Filed July 18, 1951.

[Title of District Court and Cause.]

CLERK'S RECORD OF TRIAL

Now on this 10th day of October, 1950, J. Charles Dennis, U. S. Attorney, appears for the Government. Rolla V. Houghton and Jack R. Cluck, of Houghton, Cluck, Coughlin & Henry, appears for the Plaintiff, R. P. Jandl, as Admr. of the Estate of William F. Leland, deceased. Julian O. Matthews, of Macbride, Matthews and Hanify, appears for the Defendant, Eagle Star Insurance Co., Ltd. Ward L. Sax also appears for the Defendant.

This cause is called for trial. All of the parties

are present through their counsel. Both sides announce they are ready. Rolla V. Houghton and Jack R. Cluck make their opening statements to the Court on behalf of the plaintiffs; Mr. Julian O. Matthews and Beverley S. Wilkerson make their opening statements to the Court on behalf of the defendants.

Stipulation between the parties is filed. The Plaintiffs' Exhibits Nos. 1, 2, 3, 5 and 7 are admitted; 4 and 6 are marked. The Defendant's Exhibits Nos. A-1 and A-2 are marked.

At 12:04 p.m. All are excused until 1:30 p.m. and Court is in recess until then.

At 1:30 p.m. Court is in session. All are present in the cause on trial and the trial is resumed. The defendants' Exhibits Numbered A-1 and A-3 are admitted. A-2 is withdrawn and returned to Mr. Matthews for him to have photostatic copies made. The Plaintiffs' Exhibits Numbered 4, 6 and 8 are admitted. Mr. R. P. Jandl is sworn and testifies for the plaintiffs.

At 4:13 p.m. the Plaintiffs rest.

The defendants orally challenge the sufficiency of the evidence and move to dismiss. This motion is held in abeyance. Dorothy Sawyer, Edward G. Meredith and Robert H. Wiley are sworn and testify for and on behalf of the defendants.

At 5:15 p.m. all are excused until 9:30 a.m., October 11, 1950, and Court stands adjourned until then.

Now on this 11th day of October, 1950, J. Charles Dennis, U. S. Attorney, appears for the Govern-

ment. Mr. Rolla V. Houghton and Mr. Jack R. Cluck, of Houghton, Cluck, Coughlin & Henry, appear for the Plaintiff, R. P. Jandl, etc. Julian O. Matthews, of MacBride, Matthews & Hanify; Beverly S. Wilkerson and Ward L. Sax appear for the Defendant, Eagle Star Insurance Co., Ltd., a corp.

This cause comes on before the Court without a jury for further trial. All of the parties are present through their respective counsel and the trial is resumed.

The Plaintiffs' Memo of points and authorities is filed.

Mr. Robert H. Wiley further testifies for the defendants. Mr. Kenneth Buzzell and Emmett G. Flood, Jr., are sworn and testify for and on behalf of the defendants. The Defendants' Exhibits Numbered A-4 is rejected; A-5 is admitted. Mr. Richard Charles Davidson and Lawrence J. Strong are sworn and testify for the defendants.

Court is in recess from 11:00 a.m. to 11:10 a.m. at which time Court is in session, all are present as heretofore and the trial is resumed. Mr. Lawrence J. Strong further testifies for the defendants. Mr. R. P. Jandl is called and now testifies for the defendants as an adverse witness.

At 12:02 p.m. all are excused until 1:30 p.m. and Court is in recess until 1:30 p.m. at which time Court is in session, all are present in the cause on trial as heretofore. Mr. R. P. Jandl further testifies for the defendants. The Defendants' Exhibits Numbered A-6, A-8, A-9 and A-10 are admitted. Mr.

Leon D. Cutteback and Mr. Douglas B. Miner are sworn and testify for the defendants. The Defendants' Exhibits Numbered A-11 and A-12 are admitted.

Court is in recess from 3:25 p.m. to 3:37 p.m. at which time Court is in session, all are present as heretofore and the trial is resumed. Stipulation regarding passengers on board airplane flight is filed.

Mr. Leon D. Cutteback further testifies for the defendant. Mr. John O. Vineyard is sworn and testifies for the defendants.

At 4:55 p.m. all are excused until 9:30 a.m., Thursday, October 12, 1950, and Court stands adjourned until then.

Now on this 12th day of October, 1950, J. Charles Dennis, U. S. Attorney, appears for the Government. Jack R. Cluck, of Houghton, Cluck, Coughlin & Henry, appears for the Plaintiff, R. P. Jandl. Mr. Rolla V. Houghton of said firm also appears for the Plaintiff. Julian O. Matthews, of Macbride, Matthews and Hanify appears for the Defendants, Eagle Star Insurance Co., Ltd., et al. Beverley S. Wilkerson and Ward L. Sax also appear for said Defendants.

This cause comes on before the Court without a jury for further trial. All of the parties are present through their counsel. Mr. Victor M. Ganzer is sworn and testifies for and on behalf of the defendants. Mr. A. Elliott Merrill and John B. Sweet are sworn and testify for and on behalf of the defendants. A Deposition of John Kendall, Jr., is

read. Deposition of Mr. George M. Cole is read on behalf of the defendants.

Court is in recess from 10:50 a.m. to 11:01 a.m. at which time Court is in session, all are present as heretofore and the trial is resumed. Depositions of Donald F. Lynch, James Wendell Smith and Charles S. Belknap are read on behalf of the defendants. The Defendants' Exhibits Numbered A-2 is reoffered and now rejected; A-14 and A-4 are admitted; A-7 is withdrawn and returned to defendants' counsel by stipulation of counsel. The Plaintiffs' Exhibit No. 9 is admitted. Both sides rest their case in chief.

At 11:59 a.m. Court is in recess until 1:30 p.m. and all are excused in the cause on trial until then.

At 1:35 p.m. all are present in the cause on trial.

Mr. Louis Charles Mugge is sworn and testifies for the plaintiffs on rebuttal. The Plaintiffs' Exhibit No. 10 is admitted. Mr. Robert H. Wiley and Edward R. Crook now testify for the plaintiffs.

Court is in recess from 2:53 p.m. to 3:10 p.m. at which time Court is in session, all are present as heretofore and the trial is resumed. Mr. James A. Cook, Lawrence J. Strong, Louis Charles Mugge are recalled and further testify. At 5:00 p.m. the Plaintiffs rest. John O. Vineyard is recalled by the defendants and further testifies for the defendants on surrebuttal.

At 5:08 p.m. both sides rest.

All are excused in the trial of this cause until 9:30 a.m., October 13, 1950, and Court stands adjourned until then.

Now on this 13th day of October, 1950, J. Charles Dennis, U. S. Attorney, appears for the Government. Mr. Rolla V. Houghton and Mr. Jack R. Cluck, of Houghton, Cluck, Coughlin & Henry, appears for the Plaintiff, R. P. Jandl. Mr. Julian O. Matthews, of Macbride, Matthews and Hanify, appears for the Defendant, Eagle Star Insurance Co., Ltd., et al. Beverley S. Wilkerson and Ward L. Sax also appear for said Defendant.

This cause comes on before the Court without a jury for further trial. All of the parties are present through their counsel.

The testimony having been concluded, the Court hears arguments of counsel. Mr. Rolla V. Houghton opens arguments for the Plaintiffs. Mr. Beverley S. Wilkerson opens arguments for the defendants. Mr. Julian O. Matthews closes arguments for the defendants. Mr. Jack R. Cluck closes argument for the plaintiffs.

After hearing arguments of counsel, the Court takes the cause under advisement.

At 11:55 a.m. all are excused. Court is in recess until 1:30 p.m.

Journal No. 42,

Pages, 124, 125, 126, 127, 128 and 130.

[Endorsed]: Filed July 13, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 10th day of October, 1950, before the undersigned judge of the above-entitled court, sitting without a jury, the plaintiff the United States of America being represented by its attorney, J. Charles Dennis, and the plaintiffs R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines, being represented by their attorneys, Houghton, Cluck, Coughlin & Henry, and the defendants being represented by their attorneys, Macbride, Matthews & Hanify, and oral and documentary evidence having been introduced by the parties, and the court having considered all of the evidence and the arguments of counsel, and the court having heretofore issued the court's opinion in writing, the court now makes the following

Findings of Fact

I.

That the plaintiff R. P. Jandl is the duly qualified and acting administrator of the Estate of William F. Leland, deceased, having been so appointed by the Superior Court of the State of Washington in and for the County of King, and said plaintiff has been authorized by said court to bring this action.

II.

That the plaintiff C. W. Breakiron is the duly qualified and acting Successor Receiver for Atlantic and Pacific Airlines, having been so appointed by the District Court of Galveston County, Texas, and has been authorized to join as a party plaintiff in this action.

III.

That the defendants are all subjects of the British Empire.

IV.

That exclusive of interest and costs, the matter in controversy in this action exceeds the sum of \$3,000.

V.

That on July 21, 1948, defendants issued to William F. Leland certificate of insurance No. W-OMA-253, a true copy of which is attached to the plaintiffs' amended complaint herein, which certificate insures said Leland as the owner of a Douglas DC-3 airplane No. NC 79025 as provided therein, subject, however, to the terms, conditions and limitations contained in said certificate or policy of insurance.

VI.

That said policy of insurance was in effect on January 2, 1949.

VII.

That the rights of the plaintiff United States of America and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines, are derivative

from and are no greater than those of William F. Leland, the insured named in said policy.

VIII.

That on January 2, 1949, at Boeing Field, Seattle, Washington, William F. Leland, the assured named in said policy, caused the acting pilot of said insured airplane to attempt to take said airplane off in flight from said field; that in said attempted take-off, said airplane became partially airborne and thereafter crashed, causing the death of said assured, William F. Leland, the pilot, co-pilot, and a number of the passengers aboard said airplane; that in said attempted take-off, said airplane struck a revetment hangar owned by King County causing damage thereto and that said aircraft was wrecked and except for small salvage was totally destroyed.

IX.

That William F. Leland, the assured, and the owner of the insured aircraft, personally failed to use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss or damage to the insured aircraft on January 2, 1949, when said aircraft was wrecked in an attempted take-off from Boeing Field in that said Leland negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions and when said insured aircraft had an accumulation of ice, snow and frost on the upper surface of its wings and fuselage and had icicles

hanging to its under surfaces, which conditions materially impaired the lifting qualities of its wings. That each and all of said conditions made it extremely unsafe to attempt to fly said aircraft, and as to all of said conditions the said assured owner personally was forewarned and had or should have had personal knowledge thereof.

X.

That all damage caused in said crash to said insured airplane and the revetment hangar located on Boeing Field which said airplane struck at the time of said crash, was proximately caused by the negligence of said Leland and by the failure of said Leland to use due diligence in the operation of said airplane as hereinabove set forth.

XI.

That in operating said airplane in the manner and under the conditions set forth above, the assured violated the express terms and conditions of said contract of insurance.

Done in Open Court this 23rd day of July, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

From the foregoing Findings of Fact, the Court now makes the following

Conclusions of Law

I.

That plaintiffs are not entitled to any of the relief prayed for in their amended complaint.

II.

That the plaintiffs' actions herein should be dismissed with prejudice without costs.

Done in Open Court this 23rd day of July, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ JULIAN O. MATTHEWS,

Of MacBride, Matthews & Hanify, Attorneys for Defendants.

Receipt of Copy acknowledged.

Lodged July 19, 1951.

[Endorsed]: Filed July 23, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2401

THE UNITED STATES OF AMERICA, R. P.
JANDL, as Administrator of the Estate of
WILLIAM F. LELAND, Deceased, and C. W.
BREAKIRON, Successor Receiver for Atlantic
and Pacific Airlines,

Plaintiffs,

vs.

EAGLE STAR INSURANCE COMPANY, LIM-
ITED; ORION INSURANCE COMPANY,
LIMITED; THE DRAKE INSURANCE
COMPANY, LIMITED, Subscribing Under-
writing Members of Lloyd's, London,

Defendants.

JUDGMENT

This Cause having come on regularly for trial on the 10th day of October, 1950, before the undersigned judge of the above-entitled court, sitting without a jury, the plaintiff The United States of America being represented by its attorney, J. Charles Dennis, and the plaintiffs R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines, being represented by their attorneys, Houghton, Cluck, Coughlin & Henry, and the defendants being represented by their attorneys, Macbride, Matthews & Hanify, and

oral and documentary evidence having been introduced by the parties, and the court having considered all of the evidence and the arguments of counsel, and the court having heretofore entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs are not entitled to any of the relief prayed for in their amended complaint and that plaintiffs' first and second causes of action be and they are hereby dismissed with prejudice.

It Is Further Ordered, Adjudged and Decreed that the defendants do not recover judgment against the plaintiffs for defendants' costs and disbursements herein and that no party recover against another any costs herein.

Done in Open Court this 23rd day of July, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ JULIAN O. MATTHEWS, of

MACBRIDE, MATTHEWS &
HANIFY,

Attorneys for Defendants.

Receipt of Copy acknowledged.

Lodged July 19, 1951.

[Endorsed]: Filed and entered July 23, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Each of the Defendants Above Named and Their
Attorneys of Record:

You Are Hereby Notified that, pursuant to Rule 73, Federal Rules of Civil Procedure, each of the plaintiffs above named is taking an appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment, and each and every part thereof, made by Honorable John C. Bowen and entered herein on July 24, 1951.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,

Attorneys for R. P. Jandl, as Administrator of the
Estate of William L. Leland, Deceased, and
C. W. Breakiron, Successor Receiver for At-
lantic and Pacific Airlines.

/s/ J. CHARLES DENNIS,
United States Attorney, for
United States of America.

[Endorsed]: Filed August 23, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY PLAINTIFFS-APPELLANTS

To the Clerk of the Above-Entitled Court:

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, each of the plaintiffs-appellants above named hereby designates as the contents of the record on appeal the complete record and all the proceedings and evidence in the above-entitled action.

HOUGHTON, CLUCK,
COUGHLIN & HENRY,

Attorneys for R. P. Jandl, as Administrator of the Estate of William L. Leland, Deceased, and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines.

/s/ J. CHARLES DENNIS,
United States Attorney, for
United States of America.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 29, 1951.

[Title of District Court and Cause.]

DEFENDANTS' AND APPELLEES' DESIGNATION OF ADDITIONAL MATTER FOR RECORD

Now Come the defendants and in accordance with Rule 75(a) of the Rules of Civil Procedure designate the following as portions of the proceedings which they deem are within plaintiffs' designation but are not included in the reporter's transcript of proceedings and should be added to the record:

1. Add to the reporter's stenographic transcript of the proceedings in the district court, the attached record of the stenographer's notes.

/s/ JULIAN O. MATTHEWS, of
MACBRIDE, MATTHEWS &
HANIFY,
Counsel for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 7, 1951.

[Title of District Court and Cause.]

**INTRODUCTION OF EXHIBITS
IN OPENING STATEMENT**

Mr. Houghton: Paragraph V alleges that C. W. Breakiron is the duly qualified and acting Successor Receiver for Atlantic and Pacific Airlines, appointed in the case named in the complaint in the District Court of Galveston County, Texas, Tenth

Judicial District, and joins in this action pursuant to court order duly entered in that cause.

I have a certified copy of that court order, of two court orders, one appointing Mr. Breakiron as the Successor Receiver, and one authorizing him to join in this action. The stipulation provides that these copies may be admitted in evidence regardless of whether they are certified in all respects as required by the rules of this court or not, and I was wondering if it would be appropriate to have them marked and enter them at this time.

The Court: Is there any objection?

Mr. Matthews: No objection.

(Copy of court order marked Plaintiffs' Exhibit 1 for identification.)

(Copy of court order marked Plaintiffs' Exhibit 2 for identification.)

Mr. Houghton: I have here copies, uncertified, of the note and mortgage held by Breakiron, and the stipulation provides that these uncertified copies shall be admissible in evidence to the same extent and effect as if the originals or duly certified copies were produced and identified, and with that in mind, I think it might be well to offer these two copies in evidence at this time. You have no objection, Mr. Matthews?

Mr. Matthews: We have agreed not to put you to the trouble of certifying copies or bringing your witnesses here to identify them, and that these copies which you say are true may be admitted as though the originals had been identified. [2*]

The Court: Mr. Houghton, what do you understand to be the kind of thing Plaintiffs' Exhibit 1 is? Is it an attorney's employment contract?

Mr. Houghton: I take it that it is a contract employing attorneys, a court order authorizing the employment of attorneys and the maintaining of litigation here. It does not refer to this particular court, but it does authorize the receiver to employ attorneys and prosecute this particular claim.

The Court: What do you understand Plaintiffs' Exhibit 2 is in its nature?

Mr. Houghton: I think it is an order accepting the resignation of the original receiver, Edward W. Watson, and appointing Mr. Breakiron Successor Receiver in his place. The receiver's claim was originally filed by Mr. Watson, who was then the receiver. The claim was filed in Superior Court by Mr. Watson. He resigned and the Court accepted his resignation and appointed Mr. Breakiron receiver in his place. I think the net result of it now is that Mr. Breakiron is now the holder of this claim and is authorized to prosecute it here.

The Court: Do you offer each of these exhibits, Plaintiffs' Exhibits 1 and 2?

Mr. Houghton: Yes, your Honor.

The Court: Is there any objection? [3]

Mr. Matthews: No objection, your Honor.

The Court: Each of them is admitted.

(Plaintiffs' Exhibits 1 and 2 received in evidence.)

The Court: How many exhibits have you offered?

Mr. Houghton: I have offered four. I have offered the two court orders from Texas and the note and mortgage held by Mr. Breakiron.

The Court: If it is the note and second mortgage, will you let them both be marked together?

Mr. Houghton: Yes, your Honor. That makes three.

(Copies of note and mortgage marked Plaintiffs' Exhibit 3 for identification.)

Mr. Houghton: It will be noted from Plaintiffs' Exhibit 3 that this note and mortgage were originally signed by William F. Leland and Robert E. Stone.

I have here an original instrument which I probably did not call to counsel's attention, in which Mr. Leland and Mr. Stone dissolved their partnership on October 2, 1947, and Mr. Leland assumed all obligations of the partnership, including this note and second mortgage. Do you care to see it, counsel, or do you have any objection to admitting that in evidence?

The Court: Does it purport to convey to Leland any successor rights in the partnership assets? [4]

Mr. Houghton: Yes. Stone conveyed to Leland all his rights in the partnership and Leland assumed all obligations of the partnership and referred expressly to this indebtedness that was owing to this receiver.

The Court: That is a different thing from Plaintiffs' Exhibit 3. You should have it marked.

Mr. Matthews: Mr. Houghton, we would like an opportunity to examine that document. I have never heard of it or seen it, and I will do so at the first opportunity.

Mr. Houghton: Let it be admitted subject to your examination. It does not affect your rights.

(Agreement marked Plaintiffs' Exhibit 4 for identification.)

The Court: It has been marked Plaintiffs' Exhibit 4 for identification, and as to whether or when it may be offered and/or admitted is another question.

Mr. Houghton: It is offered in evidence at this time, your Honor.

The Court: The Court will reserve ruling until counsel for defendants has an opportunity to examine it. I would like to ask Mr. Houghton if he can give it a name which reflects the character of the information, the briefest possible name.

Mr. Houghton: Yes, dissolution of partnership.

The Court: Of the Leland-Stone partnership, is that [5] right?

Mr. Houghton: That is correct.

Mr. Houghton: This is section 10 of the stipulation, your Honor, on page 4. "It is stipulated that Exhibit H attached hereto is a true copy of a letter written by the attorneys for the plaintiff administrator to Merrill P. Totten & Company, Insurance adjusters designated by defendants to represent them in the handling of claims under the policy sued

on in this action, and that the same shall be admissible in evidence to the same extent as, but no greater extent than, the original letter would be if identified and offered in evidence.”

That is a letter, dated May 13, 1949, signed by myself, and addressed to Morrell P. Totten & Company, 15th Floor, 821 Second Avenue Building, Seattle, Washington, Re: Lloyd's Certificate W-OMA-253 on Douglas DC-3 NC 79025, Estate of William F. Leland.

“Gentlemen: It has been more than four months since the above plane was destroyed and we have had no indication as to when, if ever, settlement can be expected on the above policy. We feel that the matter has been allowed to run long enough and are writing to advise you that unless your company either pays the policy or gives definite indication of its intention to pay it by May 19, 1949, we expect to [6] apply to the Probate Department of the Superior Court of King County for authority to sue on the certificate. Yours very truly, R. V. Houghton.”

That was written on the stationery of Houghton, Cluck, Coughlin & Henry. At this time, your Honor, I offer that letter in evidence.

The Court: Let it be marked Plaintiffs' Exhibit 5.

(Copy of letter of 5-13-49, marked Plaintiffs' Exhibit 5 for identification.)

Mr. Houghton: Will your Honor simply mark the copy that is attached to the exhibit, or will you prefer——

The Court: If you have another copy, it would be better. Do you offer that in evidence?

Mr. Houghton: I do.

The Court: Is there any objection?

Mr. Matthews: No objection, your Honor.

The Court: Admitted.

(Plaintiffs' Exhibit 5 received in evidence.)

Mr. Houghton: Paragraph 5 of the stipulation provides that: "If either party desires to introduce in evidence at the trial of this cause any part of the records of the Superior Court of the State of Washington for King County in Probate Proceeding No. 109506 entitled: 'In the Matter of the [7] Estate of William F. Leland,' " or in Cause No. 413677, entitled King County v. Jandl, it shall not be necessary for him to procure certified copies or authenticated copies, but he may submit uncertified copies and submit them to the attorney for the other side, and if they are found to be true copies, they will be admitted to the same extent and effect as if they were duly certified or authenticated copies.

With that in mind, I have, Mr. Matthews, copies here of the summons and complaint, the answer, the memorandum decision, the findings of fact and conclusions of law and the judgment in this case of King County v. Leland, which I now wish to offer in evidence.

The Court: Let it be marked Plaintiffs' Exhibit 6.

(Copies of files in Cause No. 413677 marked Plaintiffs' Exhibit 6 for identification.)

Mr. Houghton: It is King County v. Jandl as Administrator of Leland's estate. Part of them have been sent to Mr. Matthews in the past. The judgment was only entered on the 9th of October, that was yesterday, and I believe they brought down the original file. These may all be marked as an exhibit, and I offer them in evidence.

Mr. Matthews: I have no objection to the summons and complaint, the answer and the reply, or to the findings of fact, conclusions of law and judgment. I do not believe the memorandum opinion is material or competent or relevant [8] or proof of any fact at issue in this case.

Mr. Houghton: In that case, we will consent to removing the memorandum opinion.

The Court: Counsel may take that out.

Mr. Houghton: We will reserve the right to offer it later if we think it is material to any issue in the case.

The Court: Do you offer Plaintiffs' Exhibit 6, comprising the remainder of the papers mentioned?

Mr. Houghton: Yes.

Mr. Matthews: I have not examined the findings of fact and conclusions of law. They were just entered yesterday. I have not seen them.

Mr. Houghton: A copy was sent to you, except I think the attorney made a repetition of the claim of negligence, which would be to your benefit, if anything.

The Court: At the recess counsel for defendant may look at these papers and see if there is any objection he wishes to make.

Mr. Houghton: Does the Court reserve their admission?

The Court: I do.

Mr. Houghton: Section 7 of the stipulation states: "It is stipulated that Exhibits E, F and G, attached hereto, are copies of letters written by plaintiff Jandl's attorneys, Houghton, Cluck, Coughlin & Henry, to defendants' agent D. K. MacDonald & Company regarding the claim and suit of [9] King County, Washington, mentioned in plaintiffs' amended complaint, second claim, paragraph II, and that such copies shall be admissible in evidence to the same extent as, but no greater extent than, the original letters would be if identified and offered in evidence."

These letters that are attached to the stipulation, marked Exhibits E, F and G, are letters written to D. K. MacDonald & Company advising them of the filing of this claim by Leland, tendering them the defense of the suit, and notifying them that if they fail to defend the suit the Administrator, Jandl, would employ counsel and defend it. The statements in that regard are summed up in the last paragraph of Exhibit G: "The Administrator considers"—

The Court: Is it in evidence?

Mr. Houghton: I am going to offer these. I was calling attention to what they were.

The Court: Let the papers be in evidence before you read them as if they were.

Mr. Houghton: Thank you, your Honor. I offer these three exhibits, E, F and G, as attached to the stipulation, in evidence.

The Court: Let them all be marked Plaintiffs' Exhibit 7.

(Copies of letters of 7-8-49, 11-4-49, and 2-1-50, marked Plaintiffs' Exhibit 7 for identification.) [10]

Mr. Houghton: Plaintiffs' Exhibit 7 is offered in evidence, your Honor.

Mr. Matthews: No objection.

The Court: Admitted.

(Plaintiffs' Exhibit 7 received in evidence.)

Mr. Matthews: We have entered into a stipulation concerning the introduction of certain records in an effort to save time, and, Mr. Houghton, I would now like to offer in evidence as our first exhibit the application made by the Seattle Air Charter to the Department of Commerce for an extension of time in which to comply with the regulation to which I have just referred with respect to fireproofing, and the reply received from R. D. Bedinger, the Regional Administrator. I understand you have also been furnished a copy.

Mr. Houghton: We did not actually get one. I guess they had one there for us, but we did not go after it, so if we could just glance through it, I am sure it is all right.

(Letters of 11-29-48, and 12-1-48, marked Defendants' Exhibit A-1 for identification.)

The Court: What do you call that, if you can give it a name agreeable to all counsel?

Mr. Matthews: I would say it was the application to [11] the Civil Aeronautics Authority in connection with the fireproofing requirements.

The Court: For time extension for compliance?

Mr. Matthews: Yes.

The Court: Application for time extension for compliance?

Mr. Matthews: And letter granting the extension.

With respect to establishing the weight of the airplane, your Honor, it became necessary to establish the weight of the various passengers that were aboard the airplane, and to save the expense of taking depositions or bringing the students here, many of whom are scattered in various parts of the country, we stipulated that the records of Yale University, the Health Department at Yale University, certified by the custodian thereof, might be offered in evidence with the same effect as though the custodian were present and testified that these were the records of Yale University, kept in the ordinary course of business.

I have just handed to the clerk a photostatic copy of those records. As to one boy by the name of Adams, I took up with Mr. Cluck the question of his weight and it was agreed between us if Mr. Adams, who lives in Corvallis, Oregon, were to send a telegram stating what his weight was at the time he boarded the plane, that that telegram might be admitted in evidence with the same force and effect

as [12] though Mr. Adams, one of the passengers, was here testifying to his weight. I now offer in evidence the records we have obtained and the telegram to which I have just referred.

(Records of Yale University marked Defendants' Exhibit A-2 for identification.)

Mr. Matthews: I might say in connection with those that Yale University said they would have to obliterate from the record anything that had to do with other than the boy's age and weight, because that would be information of a confidential nature, and that has been done as certified.

The Court: Why did you not get white background photostats?

Mr. Matthews: I wish I had done that, your Honor. It would have meant photostating them twice, and I had to do it over the telephone, and that is what they sent us and they did not arrive until day before yesterday.

The Court: I think the Court will have to make a rule on that, because it seems I cannot get the word around among members of the bar. I am going to have to make a rule that nothing but white background photostats will be received in evidence and then leave counsel to their own devices.

Mr. Matthews: I will have these rephotostated, your Honor. The second photostat will come out white.

Mr. Cluck: If I understood you correctly that you are now offering these in evidence, we will have objections [13] to offer to their admissibility, as we

told you, having stipulated only as to the matter of formal certification, so we would like an opportunity to see the proffered exhibit and then tender objections to its admissibility. We strongly object to its admission.

The Court: Can you get the white photostats between now and tomorrow morning?

Mr. Matthews: Yes, your Honor.

The Court: Doubtless there are local businesses prepared to do it. Then I suggest that they be returned to counsel for that purpose.

Mr. Matthews: Mr. Cluck, have I correctly stated the stipulation between us concerning the telegram and the fact that the records can be considered as though the custodian was here testifying that they are the official records of Yale University?

Mr. Cluck: Yes. I think we should have the language of the stipulation before the Court, if you care to read it. "Copies of any records of Yale University"—that is the second paragraph on the first page of the stipulation—"or any of its departments, certified to be true copies of such records by any person who certifies that he has custody or possession thereof, shall be admissible in evidence in this cause to the same extent as, but no greater extent than, the original records would be if the official custodian thereof [14] produced them in open court and testified to their genuineness."

In other words, the purpose of that stipulation, as you know, was to eliminate the inconvenience of formal certification, but objections on every other

ground are preserved and we will have objections to offer.

Mr. Matthews: Do you mind looking at the certificate and telling me if you have any objection to the form of the certificate?

Mr. Cluck: There is no objection as to the form of the certificate.

Mr. Matthews: And the telegram?

Mr. Cluck: You stated correctly the stipulation, that as to the single student, Robert R. Adams, we stipulated as you stated.

The Court: Defendants' Exhibit A-2 is now withdrawn and returned to counsel who produced it so that he may then put it in such condition as will be more legible and readable.

Mr. Houghton: May it please the Court, before we start on the testimony, were Exhibits 4 and 6 admitted? They were reserved while counsel checked them. Exhibit 4 was that partnership dissolution between Leland and his partner.

The Court: I have not yet ruled upon it. Do you [15] offer it?

Mr. Houghton: Yes, I offer Exhibit 4.

The Court: Any objection?

Mr. Matthews: May I see them?

The Court: Let him see also Plaintiffs' Exhibit 6.

Mr. Wilkerson: We have examined Exhibit 6 and have no objection to its admission.

The Court: Plaintiffs' Exhibit 6 is now admitted.

(Plaintiffs' Exhibit 6 received in evidence.)

Mr. Wilkerson: We have no objection to Plaintiffs' Exhibit 4.

The Court: Plaintiffs' Exhibit 4 is now admitted.

(Plaintiffs' Exhibit 4 received in evidence.)

The Court: Defendants' Exhibit A-1 has not been ruled upon as to admissibility.

Mr. Houghton: Counsel offered Defendants' Exhibit A-1. We have no objection to the admission of that.

The Court: Defendants' Exhibit A-1 is now admitted.

(Defendants' Exhibit A-1 received in evidence.)

(Copy of memorandum opinion marked Plaintiffs' Exhibit 8 for identification.) [16]

Mr. Houghton: Your Honor, what has been marked Plaintiffs' Exhibit 8 for identification is the copy of the Court's memorandum decision in this case of Leland vs. King County. I offer that in evidence on the basis that I think it is proper and material to have that additional portion of the record in that case in evidence.

The Court: Is there any objection?

Mr. Matthews: It is objected to as incompetent, irrelevant and immaterial.

The Court: On what issue do you offer it?

Mr. Houghton: Just on the general issue in the case.

The Court: I wish you would state the issue. What do you seek to prove by this?

Mr. Houghton: Simply that recovery was had by the County, and that is a part of the file.

The Court: Was it on the second claim?

Mr. Houghton: Yes, your Honor.

The Court: Does it purport to fix the amount of recovery of the County from the insured?

Mr. Houghton: No, sir. The judgment, I think, does that. You have there a copy of the judgment rendered by the Court. It simply shows the basis for the Court's judgment.

The Court: The objection is overruled. Plaintiffs' Exhibit 8 is now admitted.

(Plaintiffs' Exhibit 8 received in [17] evidence.)

[Title of District Court and Cause.]

PROCEEDINGS AT TIME OF ENTERING
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT ON JULY 23, 1951

The Court: In the case of United States of America, R. P. Jandl and others against Eagle Star Insurance Co., Ltd., and others, are parties and counsel present representing all of the litigants?

Mr. Cluck: They are, your Honor, except that counsel for the United States of America is not present.

The Court: Do you know why?

Mr. Cluck: I do not, your Honor.

The Court: We will proceed.

Mr. Matthews: We have submitted, your Honor,

proposed forms of findings of fact, conclusions of law and judgment. We have lodged the original with the clerk of the Court and have served both the United States and Mr. Houghton and Mr. Cluck.

The Court: Is there any objection to the form?

Mr. Matthews: No objections have been served upon us, your Honor.

The Court: Did any of you have any conversation with the United States Attorney or anyone representing him and his office?

Mr. Cluck: No, we did not, your Honor. I am not sure that I had the full meaning of your question as to whether or not there was any [18] objection.

The Court: What I am trying to find out is does anyone present know of some reason why the United States Attorney has elected not to be present?

Mr. Cluck: No, we do not.

Mr. Wilkerson: I might say at the trial Mr. Dennis asked to be excused, saying that he was perfectly willing to have Mr. Houghton and Mr. Cluck represent him, and it is possible he still has that in mind.

The Court: I rather suspect that the office has unintentionally overlooked the hour. I would like to ask one of the plaintiffs' counsel, do you feel agreeable to reminding the United States Attorney's office of the appointment and feel it would be appropriate to be excused for a moment while that is done?

Mr. Cluck: We so request, your Honor.

The Court: The Court will extend a few mo-

ments. I would suggest that you try to see Mr. Dennis if you can, Mr. Cluck. You are excused for a few minutes.

(Recess.)

Mr. Cluck: If the Court please, Mr. Dennis had not overlooked the matter but stated that he is occupied with grand jury work and asked that Mr. Houghton and myself go ahead with it.

The Court: Are you willing to do that?

Mr. Cluck: Yes, we are. [19]

The Court: I will hear any objections which counsel for plaintiffs may wish to state.

Mr. Cluck: If the Court please, we object to paragraphs IX to XI, inclusive, of the findings on the ground that the evidence does not sustain the finding either that there was negligence on the part of the insured, or, if there was, that any damage referred to in the action was caused thereby.

Since present court rules do not require the making of exceptions to findings, we want to be clear that express reference to any numbered finding does not constitute a waiver to any other.

There is one particular phase of the proposed findings, I think should require the attention of the Court, and that is the reference to overloading. That is found on page 3, paragraph IX, lines 25 to 29, inclusive. The Court's written opinion does not refer to overloading.

When the matter came up in the course of trial, I think your Honor will recall that there was no weighing in of the baggage, and that the proof

offered consisted entirely, as I recall, or at least primarily, of certain witnesses who simply felt and lifted the baggage and from that only sought to give judgment of what each consisted of. In fact, witnesses actually didn't lift each; they looked at them. I emphasize that because the Court will remember making a [20] cryptic observation to the effect that he could see, if pork was involved, how one could estimate the weight of porkers by looking at them, but not baggage where no one knew what the inside of the baggage was.

I think it significant that the Court did not make a finding in the matter of overloading, and reference here in the proposed draft actually goes beyond what the Court has found. I refer to the language starting in line 25, page 3: "* * * and at a time when said airplane was loaded in excess of the maximum take-off weight limit permitted by the operation record or limitations for said airplane and the applicable rules and regulations of the United States Government pertaining to civil aviation." That that condition existed and the accident occurred when it obtained. I think the record will show conclusively when it is transcribed that the Court at the very time when this evidence was given commented upon it in the manner we just indicated.

Mr. Wilkerson: If the Court please, counsel has overlooked in his statement a considerable portion of the evidence concerning the overloading.

The Court: What about his overlooking the

scope of the Court's discussion in the opinion and decision of the Court? Was there a comment on the scope of the Court's expressed opinion and decision at variance with the fact, or was it in keeping with the fact? [21]

Mr. Wilkerson: I think the Court made no express mention in the Court's opinion concerning weight. The Court found the assured was negligent in taking off under conditions then existing. It is true no specific mention was made of the weight. However, in the evidence presented to your Honor in the case, the evidence was clearcut that the maximum take-off weight permitted for this airplane was 25,346 pounds. The dry weight of the airplane was admitted, which was 17,696 pounds.

It was shown that there were thirty members of the crew and passengers aboard, and computing their weight in accordance with the regulations of the Civil Aeronautics Authority, that weight totals 5,100 pounds. Computing the weight of the gasoline which was aboard, 600 gallons, at 6 pounds per gallon, also in accordance with the regulations of the Civil Aeronautics Authority, we find that is 3,600 pounds. The weight of the baggage, as shown by the testimony of a boy who helped load it, was that there was considerably in excess of 40 pounds per person for the passengers aboard and that would make 1,080 pounds, so that the plane, according to the clearcut testimony, was overloaded 1230 pounds without any baggage at all. It was overloaded over 1,000 pounds excluding any baggage whatsoever from consideration.

I thought it was entirely within the scope of your Honor's decision that the insured was negligent in taking off [22] under such conditions to include a finding concerning weight on the clearcut evidence which was presented to your Honor.

The Court: Gentlemen, the Court did not express an opinion about the overloading for one reason. I will say it was not because I had an opinion that there was not overloading, but it was largely due to the fact that when the Trial Court finds on one issue of fact that there is a necessary result, that that is sufficient for the decision, and that is the reason the Court omitted to make a finding on the question of overloading.

The question of overloading was one of several, two or more, alleged fact conditions which defendant pleaded as a basis for its concluding allegation that the terms and conditions of the policy were breached by the assured and contended for the right to have the Court's decision that the policy had been voided by such condition breach, and when the Court found in defendant's favor as to one alleged fact, I felt that that was sufficient and I am willing to leave the Court's decision upon the Court's expressed finding, or the expressed condition as stated in the Court's opinion, as to the policy condition breach, and I respectfully decline to include any other factual findings or reasons for arriving at the decision announced by the Court.

So I would prefer to eliminate this language which involves that question of overloading. I am [23] considering striking out the words after the comma

following the word "wings" in line 25 down to and including the word "aviation" in line 29, and making a period instead of a comma following "wings" in line 25.

Do the findings and conclusions say anything about costs?

Mr. Wilkerson: Yes, they do, your Honor.

The Court: I would like to have argument made now, any and all contentions which you might wish to make regarding costs.

Mr. Wilkerson: It is the position of the defendant that, having prevailed, they should be entitled to costs except as against the plaintiff United States, conceding that they have no right to recover costs from the United States.

The Court: Do you know what the costs taxable would amount to?

Mr. Wilkerson: I do not know exactly, your Honor. It would be a matter of the witness' fees in the case. I should think probably not in excess of \$50, but that is a rough guess.

Mr. Matthews: My guess would be they would run considerably higher than that. I think you have forgotten about the depositions we took of the Yale students.

Mr. Wilkerson: I had overlooked the fact that we [24] had taken depositions.

Mr. Matthews: We provided the Court would reserve jurisdiction.

The Court: I do not wish to leave anything else for the Court to do in this case. I wish to do it

today and let this be the final judgment of the Court, so the aggrieved parties, if they desire, can take steps for appeal. So far as this Court is concerned, this is expected to be the final proceeding in the Trial Court concerning trial of the case.

Is there any change in the rules or anything in the rules before any such change which makes it illegal for the Court to omit to award costs in favor of either party as against the other in this case? I am considering making an order that neither party recover costs against the other and that each and all parties stand their own costs.

Mr. Wilkerson: I think your Honor has stated it correctly, that it is discretionary with your Honor.

The Court: I wish to do that, and then I would like to have special attention directed to any words that are contrary to that.

Mr. Wilkerson: In paragraph III of the conclusions of law.

The Court: Is that the first place the subject is mentioned?

Mr. Wilkerson: Yes, your Honor. [25]

The Court: I am inclined to say "without costs."

Mr. Wilkerson: The paragraph should be stricken entirely or changed so that no party recover costs.

The Court: I believe the matter could be disposed of in accordance with the Court's views by adding after the last word in the second paragraph "without costs."

Mr. Wilkerson: I think so, and strike paragraph III.

The Court: I will strike out entirely the third paragraph of the conclusions.

Mr. Wilkerson: Then I call your Honor's attention to the second ordering paragraph in the judgment as also pertaining to costs.

The Court: Is it true that counsel for defendants alone have requested findings of fact, conclusions of law and judgment in any particular form?

Mr. Wilkerson: That is true, your Honor.

The Court: As to costs, on the second page of the judgment, since you are using the words, I am thinking of striking "have and" in line 1 and substituting in place of them "do not," and striking out in lines 2, 3, and 4 the words in line 2 after "herein" and continuing to and including the word "order" in line 4.

In view of the fact that those words are now left as they are, "It is further ordered, adjudged and decreed that the defendants do not recover judgment against the [26] plaintiffs for defendants' costs and disbursements herein," would it be appropriate and more completely covered if the Court made a statement as to whether or not anyone should recover costs herein? "And that no party herein recover costs against the other," would that cover it?

Mr. Wilkerson: I think that would be appropriate, your Honor, under the circumstances.

The Court: "And that no party recover against another any costs herein." Is there any objection to those words? I wish counsel on both sides would finally inspect these papers to see if you have any

objection to those interlineations and to the findings, conclusions and judgment in the form now about to be approved by the Court.

Mr. Matthews: I think the changes which the Court made properly carry out the Court's ruling.

Mr. Cluck: No objection as to form, your Honor.

The Court: I wish each of you would look at your copy of the Court's opinion. On the first page, line 29, the word "principal," used by the Court as an adjective, was erroneously spelled as a noun. It should be —pal instead of —ple, and the Court makes that correction on the Court's copy.

Mr. Cluck: It is such a minor matter, but we might make a correction on page 2, line 31. The second word, recklessly, should be spelled without a w. [27]

The Court: Thank you. Do you find any others?

Mr. Cluck: We did not, your Honor.

Mr. Wilkerson: We did not either, your Honor.

The Court: I have made those changes. Let the findings of fact, conclusions of law and judgment in this case be now entered.

Are there any other things to be done today in this case? If not, counsel are excused.

[Endorsed]: Filed September 7, 1951. [28]

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
ORIGINAL EXHIBITS AS PART OF
RECORD ON APPEAL

Upon stipulation of the parties,

It Is Ordered that the Clerk of this court transmit
all of the original exhibits filed herein as part of
the record on appeal in this case.

Done in Open Court this 25th day of September,
1951.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ R. V. HOUGHTON, of

HOUGHTON, CLUCK,

COUGHLIN & HENRY,

Attorneys for Plaintiff R. P. Jandl, as Adminis-
trator of the Estate of William F. Leland,
Deceased, and Plaintiff C. W. Breakiron, Suc-
cessor Receiver for Atlantic and Pacific Air-
lines.

Approved for entry:

MACBRIDE, MATTHEWS &
HANIFY,

Attorneys for Defendants.

/s/ J. CHARLES DENNIS,

United States Attorney.

[Endorsed]: Filed September 25, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2401

THE UNITED STATES OF AMERICA, R. P.
JANDL, as Administrator of the Estate of
William F. LeLand, Deceased, and C. W.
BREAKIRON, Successor Receiver for Atlan-
tic and Pacific Airlines,

Plaintiffs,

vs.

EAGLE STAR INSURANCE COMPANY, LIM-
ITED; ORION INSURANCE COMPANY,
LIMITED; THE DRAKE INSURANCE
COMPANY, LIMITED, Subscribing Under-
writing Members of Lloyd's, London,

Defendants.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

October 10, 1950, 10:00 A.M.

Appearances:

J. Charles Dennis, United States Attorney, ap-
peared for plaintiff United States of America. Rolla
V. Houghton and Jack R. Cluck of Houghton,
Cluck, Coughlin & Henry appeared for plaintiff R.
P. Jandl as Administrator of the Estate of William
F. Leland, Deceased.

Julian O. Matthews and Ward L. Sax of Macbride, Matthews & Hanify and Beverly S. Wilkerson appeared for defendants.

Whereupon, opening statements having been made by counsel for plaintiffs and counsel for defendants, the following proceedings were had and done, to wit:

(Copy of court order marked Plaintiffs' Exhibit 1 for identification.)

(Copy of court order marked Plaintiffs' Exhibit 2 for identification.)

(Copies of note and mortgage marked Plaintiffs' Exhibit 3 for identification.)

(Agreement marked Plaintiffs' Exhibit 4 for identification.) [2*]

(Copy of letter of 5-13-49 marked Plaintiffs' Exhibit 5 for identification.)

(Copies of files in Cause No. 413677 marked Plaintiffs' Exhibit 6 for identification.)

(Copies of letters of 7-8-49, 11-4-49 and 2-1-50 marked Plaintiffs' Exhibit 7 for identification.)

(Letters of 11-29-48 and 12-1-48 marked Defendants' Exhibit A-1 for identification.)

(Records of Yale University marked Defendants' Exhibit A-2 for identification.)

(Plaintiffs' Exhibits 1, 2, 3, 5 and 7 received in evidence.)

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Copy of memorandum opinion marked Plaintiffs' Exhibit 8 for identification.)

(Plaintiffs' Exhibits 4, 6 and 8 received in evidence.)

PLAINTIFFS' EXHIBIT No. 6

In the Superior Court of the State of Washington,
in and for the County of King

No. 413677

KING COUNTY, a Municipal Corporation, of the
State of Washington,

Plaintiff,

vs.

R. P. JANDL, as Administrator of the Estate of
William F. Leland, Deceased,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This matter having regularly come on for trial before the Honorable Robert M. Jones, Judge of the above-entitled court, plaintiff appearing by its attorneys of record, Charles O. Carroll, Prosecuting Attorney, and K. G. Smiles, Deputy Prosecuting Attorney; defendant being present in person and being represented by his attorneys of record, Houghton, Cluck, Coughlin & Henry, and plaintiff and defendant having introduced evidence and exhibits and the court having heard the testimony

of witnesses on behalf of plaintiff and defendant and being fully advised in the premises, does hereby make the following:

Findings of Fact

I.

That the above-named plaintiff is now and at all times herein mentioned was a municipal corporation organized under and by virtue of the laws of the State of Washington. That plaintiff was and now is the owner of what is commonly known as Boeing Field, a municipal airport in King County, State of Washington.

II.

That William F. Leland died intestate in King County, Washington, on or about January 2, 1949, as the result of an airplane crash at Boeing Field, Seattle, Washington. At said time and place William F. Leland was the owner of a DC-3 Airplane which was being operated by either William F. Leland or one of his employees and agents. That at said time and place the said airplane was being operated for and on behalf of William F. Leland and in the course and scope of his business as a common carrier and operator of a public charter airplane service. That at said time and place said airplane was being operated in a negligent manner.

III.

That thereafter such things were had and done that R. P. Jandl was named as Administrator of the Estate of the said William F. Leland, deceased,

was appointed, qualified and is now acting as such Administrator.

IV.

That at the time of said airplane crash, William F. Leland was negligent in the operation of said airplane and did not exercise reasonable and ordinary care under the circumstances and conditions existing at said time and place.

V.

That as a direct and proximate result of the negligent operation of said airplane by William F. Leland or his agent, the said airplane crashed into what is known as a revetment hangar on Boeing Field, Seattle, Washington, resulting in damage to said revetment hangar in the amount of \$2,566.70. That the damage to said revetment hangar was caused solely and proximately by the negligence of the said William F. Leland or his agent. That in addition to the damage to said revetment hangar plaintiff has a claim against said estate in the sum of \$118.00 for field charges for December, 1948, January, February and March, 1949.

VI.

That plaintiff, King County, a municipal corporation, filed its duly verified claim against the Estate of William F. Leland on June 16, 1949, after serving a copy of said claim upon the defendant herein and the attorneys for said estate, to wit: Houghton, Cluck, Coughlin & Henry.

VII.

That on the 28th day of September, 1949, the said attorneys, Houghton, Cluck, Coughlin & Henry, notified plaintiff by registered mail of the rejection of said claim in its entirety with the exception of the sum of \$118.00 for field charges. That the claim for damages to said revetment hangar was rejected in its entirety.

VIII.

That the above-entitled action was commenced within thirty days of the date of the rejection of plaintiff's claim against the estate of William F. Leland.

Done in Open Court this 9th day of October, 1950.

ROBERT M. JONES,
Judge.

Conclusions of Law

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

I.

That plaintiff is entitled to judgment against the defendant in the sum of \$2566.70, together with its costs and disbursements herein to be taxed.

Done in Open Court this 9th day of October, 1950.

ROBERT M. JONES,
Judge.

Presented by:

K. G. SMILES,
One of the Attorneys for
Plaintiff.

Approved as to Form:

R. V. HOUGHTON,
Of Attorneys for Defendant.

(Copy)

In the Superior Court of the State of Washington,
in and for the County of King

No. 41377

KING COUNTY, a Municipal Corporation of the
State of Washington,

Plaintiff,

vs.

R. P. JANDL, as Administrator of the Estate of
William F. Leland, Deceased,

Defendant.

JUDGMENT

This Matter having regularly come on for trial before the Honorable Robert M. Jones on the 29th day of June, 1950, plaintiff being represented by its attorneys of record, Charles O. Carroll, Prosecuting Attorney of King County, Washington, and K. G. Smiles, Deputy Prosecuting Attorney; defendant being present in person and being represented by his attorneys of record, Houghton,

Cluck, Coughlin & Henry; plaintiff and defendant both having introduced evidence and exhibits and the court having heard the testimony adduced on behalf of plaintiff and defendant and having heretofore entered its Findings of Fact and Conclusions of Law finding and concluding that plaintiff is entitled to judgment against the defendant.

It Is Hereby Ordered, Adjudged and Decreed that plaintiff have and recover from defendant the sum of \$2566.70, together with interest on said sum from the date of this Judgment together with plaintiff's costs and disbursements herein to be taxed.

Done in Open Court this 9th day of October, 1950.

ROBERT M. JONES,
Judge.

Presented by:

K. G. SMILES,
One of the Attorneys for
Plaintiff.

Approved as to Form:

R. V. HOUGHTON,
Of Attorneys for Defendant.

Admitted October 10, 1950.

PLAINTIFFS' EXHIBIT No. 8

In the Superior Court of the State of Washington
for King County

No. 413677

KING COUNTY, a Municipal Corporation of the
State of Washington,

Plaintiff,

vs.

R. P. JANDL, as Administrator of the Estate of
William F. Leland, Deceased,

Defendant.

MEMORANDUM OPINION

KENNETH G. SMILES,

Assistant Prosecuting Attorney, Attorney for
Plaintiff.

HOUGHTON, CLUCK, COUGHLIN & HENRY,
Attorneys for Defendant.

This is a suit by King County against the administrator of the estate of William F. Leland, deceased, seeking recovery of damages arising out of the collision of the airplane of the decedent with a hangar of the plaintiff at Boeing Field. The defendant's intestate was killed in the accident, but the county proceeds under § 1520, Rem. Rev. Stat. Counsel for the defendant concedes that under the interpretations of this statute the action survives against the personal representative, thus developing the anomalous situation under which pas-

sengers in the plane who were killed, or rather their representatives, would have no right of action against the administrator for death of the passenger, but would have a right to pursue the cause of action for damage to lost baggage.

The plane in question was the one which was to carry the Yale students. There was a dense fog and a temperature below freezing. Ice was forming upon the wings of this plane. A Mr. Miner did maintenance work upon this particular airplane. He inspected the plane and testifies that its condition was good. He had on three occasions that evening attempted to clear ice from the plane. On two occasions he had brushed snow off the wings and then attempted to wash off the ice. His last effort, which was fifteen minutes before the take-off, was to wash the wings with alcohol. Within a few minutes of the time this plane attempted to take off, two other planes left the field. The wings, however, of those planes had been protected by some form of covering. The decedent Leland was in the plane. With him was a Mr. Chavers, his employee, and another pilot. It appears that Chavers was denominated as the captain of the plane. About thirty minutes before the fatal take-off, Chavers called a Mr. Vineyard to come down to the field and advise him as to whether or not the flight should be attempted. Vineyard went to the airfield, examined the plane, found ice on it, which in his opinion was enough to affect the plane's flying ability, and he advised Chavers against attempting the flight. He testifies that the plane in his opinion

was not safe for operation. The plane, however, loaded with its human cargo, taxied down to the northern end of the field and warmed up. It made the run toward the south in an attempt to take off, and from the objective evidence upon the ground it was twice in the air and then swerved to the left on the ground, crashed into the hangar and caught fire, in which accident Leland, Chavers and the other pilot were killed.

Plaintiff contends that the take-off constituted negligence after Vineyard had given his opinion that such an attempt was unsafe. It is to be remembered that the other two planes, at or about the same time, safely made their flights. Whether the swerving of the plane was due to ice upon the wings is in my opinion speculative. It therefore follows that for the plaintiff to prevail, it must do so upon the doctrine of *res ipsa loquitur*. This is not a situation where a plane in the air may come in contact with conditions which the operator in the exercise of reasonable care could not foresee or guard against. It is a case where the plane, in speeding down the runway in an attempt to take off, swerves from its course, and such swerving could potentially arise from carelessness on the part of the operator or inability of the operator to see where he was going or some mechanical defect in the intricate machinery of the plane. The plane was completely wrecked. Neither the owner nor the two pilots are available to testify as to what happened, nor do we know who was at the controls.

Passenger planes by the hundreds and thousands

daily take-off from field such as this. Accidents frequently occur in the air, to which accidents the doctrine of *res ipsa loquitur* may or may not be applicable. Certainly the veering of the plane from the runway is an accident which normally and ordinarily does not occur unless there is a mechanical failure or a human failure, and when the accident and the circumstances attending it are so unusual and of such a nature that it could not well have happened without negligence, a presumption of negligence on the part of the operator arises from the proof of such facts. Here there is the testimony of a Mr. Fennell who suggests many things that might have caused the accident, but in all, his testimony is wholly opinion testimony and in my opinion does not rebut the inference of negligence which I think arises from all of the facts and circumstances.

I therefore conclude that plaintiff is entitled to recover.

Dated This 25th day of July, 1950.

ROBERT M. JONES,
Judge.

Admitted October 10, 1950.

Mr. Houghton: I will call Mr. Jandl as a witness.

R. P. JANDL

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Houghton:

Q. Your name, please? [3]

A. R. P. Jandl.

Q. Are you the administrator of the estate of William F. Leland, deceased? A. Yes.

Q. One of the plaintiffs in this case?

A. Yes.

Q. Mr. Jandl, did you incur any expense in preparing the defense of the case of King County v. Jandl, Administrator? A. Yes.

Mr. Matthews: We admit the \$34 of expense, Mr. Houghton.

Mr. Houghton: \$34.90?

Mr. Matthews: Yes.

Mr. Houghton: Thank you. No further questions. Do you care to cross-examine?

Mr. Matthews: He is going to remain in attendance, is he?

Mr. Houghton: Yes, he will.

Mr. Matthews: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Houghton: Your Honor, I don't think I need to call another witness at this time, but I want to call your Honor's attention to one thing so as to possibly make the reservation in connection with it, and that is with regard to the proof on the value of this plane. [4] The insurance policy which is in evidence as a part of the complaint states agreed value, \$25,000. The answer of the defendants on the point states in paragraph V: "Answering Paragraph V of said complaint, defendants admit that on January 2, 1949, the aircraft above referred to crashed and burned in an attempted take-off at Boeing Field, King County, Washington, and that said aircraft suffered severe damage as the result of such happening and admit that the actual and agreed value of said aircraft is as provided in said certificate of insurance."

In the stipulation, it is agreed that the plane was totally destroyed except for salvage worth \$390. It is our opinion at this time that this statement of agreed value in the policy, together with the admission in the answer that the actual and agreed value of said aircraft is as provided in said certificate of insurance, makes a prima facie case as to the value of the plane, and I don't care to take the Court's time with going into producing witnesses and examining witnesses on the subject of the value under those circumstances.

However, we did not brief the point, because we assumed from the answer that it was admitted that the value of the plane was as set out in the policy, which is the exact words of the answer. I do not

want to introduce testimony on that point at this time, but I would [5] like to reserve the right in case it develops, which I don't think it will, that plaintiffs have the burden of going further on that item. Then I would like to reserve, if your Honor please, the right to introduce testimony on that point at a later time. Aside from that, we are ready to rest our case.

The Court: Is there any objection to this requested arrangement?

Mr. Wilkerson: If your Honor please, the original complaint alleged in Paragraph V that "On January 2, 1949, the aircraft above referred to crashed and burned in an attempted take-off at Boeing Field, King County, Washington, resulting in the complete destruction of such aircraft and of all equipment and accessories attached thereto and forming a part thereof, except for salvage from all of the foregoing to the value of \$390.20. The actual agreed value of the aircraft, as provided in the certificate above mentioned, was \$25,000.00."

There is no allegation anywhere in the complaint as to the value of the aircraft at the time of its loss. Our answer merely admitted that the value of the aircraft stated in the policy was \$25,000. The policy, of course, goes on to provide in Section B: "It is understood and agreed that Underwriters' liability under this Section in respect of any Aircraft shall not exceed the Agreed Value [6] including all equipment and accessories, as set forth in Column 8 of the Schedule, subject each and every claim in respect of Flight Risks to the

deductible applicable to each such Aircraft as set forth in Column 10 of the Schedule.”

We have no objection to counsel putting on this part of their case later, but we do not concede that they do not have the burden of showing as part of their case the value of the aircraft at the time of the crash.

The Court: I think you should do it now if it is not admitted.

Mr. Houghton: Your Honor, we did not come—as I say, the answer is not exactly as counsel suggests. The answer said: “admit that the actual and agreed value of said aircraft is as provided in said certificate of insurance.” For that reason, we did not come prepared to submit evidence on that, and we do not think we will have to take the Court’s time with such evidence, because we think that when the parties take out an insurance policy and have an agreed value right in the policy, that that is controlling or at least is *prima facie* evidence of the fact. This policy was taken out in July, five months before the accident, and they agreed right in the policy as to the value. It is an agreed value policy and we do not think we need to put on that kind of evidence, but [7] the only point—counsel said he would not have any objection to our doing it later. We did not want to hold up the trial on that item, because the probability is we will not put on evidence on it. We are going to brief it tonight. It was not called to our attention except since we have been in court counsel was denying what his answer says, so we have to check it and

decide whether we want to give evidence on it or not. We think we have made a *prima facie* case on it.

The Court: In view of that fact, do counsel for defendants object to the Court's saving to the plaintiffs the right to later put on evidence if they are so advised?

Mr. Wilkerson: We have no objection to that.

The Court: I understand subject to that right, the plaintiffs rest?

Mr. Houghton: Plaintiffs rest subject to that.

The Court: The defendants may now proceed with the defendants' case.

Mr. Matthews: May the record show that at this time the defendants challenge the sufficiency of the evidence and move for a dismissal of the plaintiffs' case. We think perhaps that motion should be made, although if it is agreeable we will not urge it because of the fact that other evidence may be introduced later on, but we do not want to be in the position of having waived anything. [8]

The Court: The Court will take it under advisement, with the effect that you may proceed with the defendants' case in chief. I wish you would remind me before the case is finally submitted on all sides that the Court has not finally ruled upon this motion.

Mr. Matthews: Defendant will call as its first witness Dorothy Sawyer.

DOROTHY SAWYER

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name, please?

A. Dorothy Sawyer.

Q. Where do you reside?

A. 9741 - 41st Avenue S.W., Seattle.

(Weather Bureau records marked Defendants' Exhibit A-3 for identification.)

Q. What is your business?

A. I am now a housewife.

Q. What business were you engaged in on January 2, 1949?

A. I was a weather observer with the Weather Bureau.

Q. Where were you stationed on that day? [9]

A. At Boeing Field, Seattle.

Q. What hours were you working on that day?

A. I believe from 4 till midnight on January 2.

Q. Handing you what has been marked as Defendants' Exhibit A-3, will you state what that document is, if you know?

A. This is a copy of the airway weather observation chart from Boeing Field.

Q. For what date? A. January 2, 1949.

Q. Commencing at 0000.

(Testimony of Dorothy Sawyer.)

The Court: Will you interpret that in language that the layman understands?

The Witness: That would be 12 midnight.

Q. And it carries through until what hour?

A. The last observation is 2342, which would be 11:42 on January 2.

Q. 1949? A. 1949.

Q. There are a number of columns to this report, and the first column is called "Type." Can you tell us what that means?

A. Type is the kind of observation.

Q. Did you make the observations and the notations that appear on that report from the time you came on duty at 4 o'clock until the last observation which is recorded on that exhibit? [10]

A. All except the one at 4:25.

Q. Who made that one?

A. It is signed C.S., Charlotte Smidke, apparently.

Q. Do the initials D.S. in the last column on the right-hand side indicate—are those your initials?

A. Yes.

Q. Is that in your handwriting? A. Yes.

Mr. Matthews: I offer Exhibit A-3.

Mr. Cluck: No objection, your Honor.

The Court: Defendants' Exhibit A-3 is admitted.

(Defendants' Exhibit A-3 received in evidence.)

(Testimony of Dorothy Sawyer.)

DEFENDANTS' EXHIBIT A-3

United States of America
United States Department of Commerce
Weather Bureau

Date: September 18, 1950

Station: Weather Bureau Office, Seattle-Tacoma
Airport, Seattle 88, Wn.

As the custodian of the records of the U.S. Weather Bureau, filed at Boeing Field, Seattle 8, Washington, I hereby certify that the attached is a true copy therefrom.

/s/ HARRY A. DOWNS,
Official in Charge.

DATE Jan. 2, 1948

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submitted October 10, 1950.

[illegible]

(Testimony of Dorothy Sawyer.)

Q. Referring now to Exhibit A-3, the second column headed "Time," that indicates the time the observation was made? A. That is correct.

Q. And all of those time observations are in accordance with 0000; what do you call that method of keeping time?

A. That is 24-hour time.

Q. Starting at midnight, 0100 would be 1 o'clock in the morning? A. Yes.

Q. 1800 would be 6 o'clock in the evening?

A. Yes. [11]

Q. And 1200 would be 12 o'clock noon?

A. Yes.

Q. The next column shows the ceiling as it was observed at the Boeing Airport? A. Yes.

Q. And the next column marked "Visibility," does that show the official visibility as observed by you at the times indicated on this report?

A. Yes.

Q. The next column is headed "Weather and obstructions to vision." What does the letter F mean that appears in several places on that weather report? A. Fog.

Q. What does SW mean that appears several places? A. Snow showers.

Q. It started to snow at what time on January 2? A. At 1558.

Q. Will you give us that time the way we usually refer to it? It will be a little clearer for the record. A. 3:58 p.m.

(Testimony of Dorothy Sawyer.)

Q. How long did it continue to snow?

A. Until approximately 5 p.m.

Q. Does this report show how much snow fell during that time?

A. I believe the code figures at 1625 would give the [12] amount. I am sorry, I don't remember these code figures.

Q. Is Mr. Meredith who is here from the Weather Bureau familiar with those code figures? Could we get that information from him?

A. Yes, I believe so.

Q. The next column is headed "Sea level pressure." What does that indicate?

A. That is the atmospheric pressure in millibars, sea level pressure, reduced to sea level.

Q. And the temperature is shown in the next column? A. Yes.

Q. And the dew point is in the next column?

A. Yes.

Q. The next column shows the wind, which is broken down as to direction, speed, character and shifts, is that right? A. That is correct.

Q. The next column is headed "Altimeter set inches." What does that mean?

A. That is taken from the atmospheric pressure.

Q. Can you explain to us what you mean by an altimeter set?

A. I am afraid I can't any more.

Q. How long have you been away from this kind of work?

A. Oh, I would say about 20 months.

(Testimony of Dorothy Sawyer.)

Q. The column "Remarks and Supplemental coded data" were [13] the entries that are made opposite your initials—were those entries made by you? A. Yes, they were.

Q. I notice you have referred opposite what is marked as 2207, in parenthesis you have indicated aircraft accident. Did you make that entry?

A. Yes.

Q. To what accident did you refer?

A. To the crash of the plane bearing the Yale students back to school.

Q. The one we have been discussing here today?

A. Yes.

Q. Under remarks and supplemental coded data, you have the words "Ice xtals." What does that mean? A. Ice crystals.

Q. Can you explain what that means in language of the layman, what weather conditions that depicts or represents?

A. Well, with a fog condition and a temperature below zero, some of the particles of fog had frozen to form ice crystals in the air.

Q. You mean a temperature below zero, or below freezing?

A. Below freezing, I am sorry.

Q. In other words, do you mean by that—I don't want to lead you—that looking out into the atmosphere against a light you could see these ice crystals in the air, is that [14] what that entry means?

A. Yes.

(Testimony of Dorothy Sawyer.)

Q. Do you remember leaving the airport that night when you went off duty?

A. No, I can't say I remember it.

Q. Do you remember testifying at the CAB hearing in connection with the investigation of this accident?

Mr. Cluck: I object to that question and any other questions relating to what was testified at any CAB hearing. An express statute applies, which I might call the Court's attention to, to prohibit the introduction of any part of the evidence of any such hearing. That is 49 U.S.C.A. Sec. 581, which provides: "* * * no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."

Mr. Matthews: This is obviously not the report of the Civil Aeronautics Board. You have been referring to it, Mr. Cluck, right along; you and Mr. Houghton were both referring to it on this gasoline business.

Mr. Cluck: I beg your pardon, but if you refer to the record, only with reference to the reason why you [15] may have made an error, not with reference to anything relevant to this proceeding. I want to preserve our objection, because the obvious purpose of the statute is to safeguard litigants so that any proceeding with reference to the

(Testimony of Dorothy Sawyer.)

proof of this or that event is to be on its own bottom in the proceeding itself and without reference to any prior Civil Aeronautics proceeding.

Mr. Matthews: I want to refresh this witness' recollection on the conditions that she observed concerning ice on the handrails and windshield of her automobile that evening around the airport, which was in the immediate vicinity of where this accident happened.

Mr. Cluck: You can ask her if she remembers that, without reference to the Civil Aeronautics Board.

The Court: I believe the objection should be sustained. It is so ordered.

Q. (By Mr. Matthews): Do you remember noticing the handrail out in front of the room where you did your observing on that night about the time of the accident? A. Yes, I believe I do.

Q. What was the condition?

A. It is a metal handrail, and it was icy. The steps are metal and they were icy and slippery, also.

Q. Do you remember any frost on the windshield of your car? [16]

A. I can't say that I remember it. I remember signing a statement that there was. I can't say that I remember now that there was at the time. I do remember signing the statement at the time that there was.

Mr. Cluck: If it will help you, counsel, we will so stipulate.

(Testimony of Dorothy Sawyer.)

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. From what point did you make your weather observations that evening? Where were you, in other words?

A. On the roof of the administration building at Boeing Field.

Q. You didn't make any observation from the north end of the runway looking south?

A. No.

Q. And so you wouldn't know what the visibility might be along the runway as seen by the pilot of an airplane at that time?

Mr. Wilkerson: If your Honor please, I object to that as being immaterial. Under the rules of the CAA the visibility reported from the tower is the only thing that is material. What the visibility may be from the end of the runway has no bearing on the issues of this case. [17]

Mr. Cluck: The answer to that is that we are not litigating rules of the CAA, we are litigating rules under an insurance policy, and the actual conditions on the runway as shown by adverse witnesses need to be pointed out and clarified, because even under counsel's own statement, that would be material to his proof of possible causes of this accident.

It is our position on this, by the way, that all

(Testimony of Dorothy Sawyer.)

evidence relating to alleged negligence is immaterial and irrelevant, and we shall submit authorities to the effect that in the absence of a very clear statement in the insurance policy itself excluding liability on that ground, that any insurer takes on the risk of the insured's being negligent. That is a general rule applicable to automobiles as well as airplanes, but here where the defendants have taken on the burden of showing that because of visibility and because of icing and because of overloading there was a breach of a particular covenant in the policy relating to manner of take-off by the pilot, then it becomes very material for us to carefully examine that proof and see whether it relates to the conditions that the pilot himself confronted at the point of take-off.

Mr. Wilkerson: If Your Honor please, we do not assume that the burden of proving these conditions—the burden [18] is at all times upon the plaintiff, of course, to show loss within the terms of the policy, which will be our position. Section 60.79 of the rules of the CAA defines ground visibility as “The average range of vision in the vicinity of an airport as reported by the United States Weather Bureau, or if unavailable, by an accredited observer.”

We have the weather report showing the visibility as being one-quarter mile. It is proper, no doubt, to ask where that is from, but what the visibility was at the end of the runway or some place else has no bearing on this case.

(Testimony of Dorothy Sawyer.)

The Court: The objection as made is overruled.

Q. (By Mr. Cluck): Your answer was no, you did not know what the condition was as to visibility from the north end of the runway looking south, is that correct? A. Yes.

Q. You recall, do you not, the conditions that night as far as weather is concerned were very variable? A. Yes.

Q. They changed every few minutes, is that correct? A. Yes.

Q. You spoke of the formation of frost on objects. Was it a case where precipitation in the air was freezing in crystalline form, is that [19] correct?

A. You mean the frost on exposed objects?

Q. Yes.

A. All I remember is, as I say, that the metal steps and handrails to the instrument shelter were icy and slick.

Q. What were you referring to when you made the notations in the report "ice crystals" that counsel referred to?

A. That is the freezing of the fog particles in the air.

Q. What were you looking at when you made the report? Did you just observe that there were ice crystals in the air generally, or did you have objects of one kind or another in mind when you made the observation?

A. I don't understand what you mean.

Q. What did you mean when you wrote "ice

(Testimony of Dorothy Sawyer.)

crystals" down several times in your weather report?

A. That I could see ice crystals in the air against lights.

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. And you observed those ice crystals from what time to what time? A. From 2146.

Q. Which would be what hour?

A. 9:46. The last observation they were carried on was 2218, which would be 10:18.

Q. Which was after the airplane crashed? [20]

A. Yes.

Q. And that condition of ice crystals suspended in the air existed continuously from the time you have mentioned? A. Yes.

Q. At 2127 you made an entry "visibility variable" and you do not make that same notation thereafter, but you indicate that visibility at 2146 was one-eighth mile and fog, is that correct?

A. Yes.

Q. And at 2158 it was one-eighth mile and fog?

A. Yes.

Q. And at 2204 it was one-quarter mile and fog?

A. Yes.

Q. At 2207, the time of the crash, it was one-quarter mile and fog? A. Yes.

Q. With these ice crystals suspended in the air?

(Testimony of Dorothy Sawyer.)

A. Yes.

Q. And that condition existed until 2218 when it was still one-quarter mile and fog? A. Yes.

Mr. Matthews: That is all.

Mr. Cluck: That is all.

The Court: Step down.

(Witness excused.) [21]

EDWARD MEREDITH

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Would you state your name?

A. Edward C. Meredith.

Q. Where do you live?

A. I live at 120 S.W. 164th Street, Seattle, Washington.

Q. Your business?

A. Supervising aviation forecaster for the U. S. Weather Bureau in Seattle.

Q. Were you occupying that position on January 2, 1949? A. I was.

Q. Do you remember the occasion of the crash of this aircraft that we have been talking about at Boeing Field? A. I do.

Q. Were you stationed at Boeing Field that night? A. Yes, sir.

(Testimony of Edward Meredith.)

Q. Where were you stationed?

A. On the second floor of the administration building, just under the tower.

Q. About how high off the ground is that?

A. 20 or 25 feet. [22]

Q. Handing you what has been marked Defendant's Exhibit A-3, I will ask you to state if you are familiar with that exhibit?

A. Yes, sir I am.

Q. Did you make any of the entries on this exhibit?

A. No, sir, they were all made on it by the official observer.

Q. You heard the testimony of the witness who just testified, Dorothy Sawyer, concerning the entries that are made on this report and what they mean?

A. Yes, sir.

Q. Have you anything to add to that, any corrections to make?

A. I have one point I would like to bring out, sir, that when the visibility is below three miles, the observations for visibility are actually transferred to the CAA tower operator and they are called to the Weather Bureau and entered as official records. The tower operators have passed examination on and are qualified as observers for visibility observations under those circumstances.

Q. Can you state whether or not this is a true copy of the official observations made by the Weather Bureau on the evening of January 2, 1949?

A. Yes, sir, it is.

Q. Those are made, you say, by qualified ob-

(Testimony of Edward Meredith.)

servers in [23] the tower who transmit the information onto this report?

A. No, sir. The visibility, when it is below three miles, is officially taken by the tower operator and is called to the weather observer over an interphone system at Boeing Field. It was an interphone system, and they are transcribed on this sheet in our office.

Q. Do you have a copy of this sheet in your office?

A. This is a copy reproduced by photostatic means of the original sheets that we still have at Boeing Field.

Q. And this represents the observations that were made in the tower, transmitted by telephone to Dorothy Sawyer and entered by her on your reports?

A. I couldn't say that for a fact, but I presume they are, because that is the regulation.

Q. That is the way it is usually done?

A. Yes, sir.

Q. How high is that tower off the ground?

A. My estimate would be about 50 feet.

Q. And it is located how close to runway No. 13, the north-south runway of Boeing Field?

A. I am not familiar with the distances on the field. Perhaps the tower operator could tell you more about that than I could.

Q. Can you tell us in this report how much snow fell on the afternoon or evening of January 2, 1949? [24]

(Testimony of Edward Meredith.)

A. I have an additional page of this record in my pocket that I referred to, and we had two-hundredths of an inch out of that snow shower.

Q. What was the temperature during that snow fall?

A. The temperature just before the shower, at our observation prior to the shower, was 39 degrees F.

Q. During what hours did the snow fall take place?

A. The first entry on this exhibit shows snow falling at 1558.

Q. Which would be what hour in standard time?

A. 3:58 in the afternoon.

Q. And it snowed continuously until what time?

A. Until 4:43 p.m., it was the last observation of snow. They issued a special at 1701, which is 5:01 p.m., eliminating the snow, so at 5 o'clock the snow storm was over.

Q. The temperature was slightly above freezing when it started to snow, was it not?

A. Yes, sir, 7 degrees.

Q. And the temperature did drop to 32 degrees shortly after it stopped snowing, is that right?

A. That is correct. The first observation we have after it was taken, with the temperature on it, after the snow shower, shows a temperature of 32 degrees.

Mr. Matthews: That is all. [25]

(Testimony of Edward Meredith.)

Cross-Examination

By Mr. Cluck:

Q. What was the ceiling at 2200 or thereabouts?

A. The official ceiling at 2204—there was no ceiling. There was no ceiling entered on the chart, on the form at all.

The Court: What does that mean so far as visibility is concerned?

The Witness: When you have—a ceiling is looking straight up, sir. If you can see the sky, the stars, the moon, then you have no ceiling, but a cloud layer will constitute a ceiling; for instance, clouds at 100 feet above the station.

The Court: Your statement that there was no ceiling means there was no ceiling to your eye, seeing as far as your eyes could see looking upward?

The Witness: That is correct.

Q. There were no obstructions from a cloud layer or otherwise looking upward, is that right?

A. They have what they call here—they have it entered as thin X, which means a thin obscuration. Exactly what that means is fog was drifting over the station, although they could see straight up so that they could distinguish objects straight up and in a cone-shaped circle vertically and they could see the stars and moon and some other heavenly body, so it was thin enough for that and they called it thin obscuration, which does not constitute a [26] ceiling.

Q. Was it or was it not part of your duties at

(Testimony of Edward Meredith.)

that time to furnish advice on weather conditions to pilots using Boeing Field? A. Yes, sir.

Q. You did do that? A. Yes, sir.

Q. They consulted you during the day?

A. Yes, sir.

Q. During the hours that you mentioned?

A. I happened to be on duty from 4 o'clock until midnight myself that day, or maybe it was 6 until 2, but I was on that evening.

Q. There were planes of various kinds, cargo, passenger planes, taking off from Boeing Field during those hours? A. Yes, there was.

Mr. Matthews: Objected to as improper cross-examination.

Mr. Cluck: It is proper cross-examination, we respectfully submit, because it is a phase of his general duties in his capacity as affiliate with the Weather Bureau concerning which you inquired, although it is not a particular phase which was covered. I think it is proper as showing what he was doing in reference not only to his weather observations, but transmittal of his observations to the people he was under a duty to furnish.

Mr. Matthews: I object about other planes taking [27] off at other times. They might have taken off under advice or not. Ther regular airlines have different standards of minimums for take-off than non-scheduled carriers.

The Court: If the time was related to the time of this attempted departure, that might answer the objection, but I do not see that qualification of the question. The objection is sustained.

(Testimony of Edward Meredith.)

Mr. Cluck: That is all.

The Court: The answer is stricken.

Redirect Examination

By Mr. Matthews:

Q. You were there at the time of the crash?

A. Yes, sir.

Q. Did you hear the airplane in which these Yale boys were riding go by your observation room?

A. Yes, sir.

Q. Could you see the airplane itself as it went by?

A. No, I was working over away from the windows so I didn't see it until after it crashed.

Q. At the time the airplane took off, could you see the runway lights that were out in front of your observation room?

A. I was paying no attention to the observations. I was working on forecasts and the observer was taking the observations. [28]

Q. You didn't look?

A. Of my own knowledge, I don't know.

Q. Did you make any observations yourself as to visibility at the time of the take-off?

A. No.

Mr. Matthews: That is all.

Mr. Cluck: That is all.

The Court: Step down.

(Witness excused.)

ROBERT WILEY

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Mr. Matthews: Your Honor, the last witness expressed a desire to be excused as soon as possible. We do not care to detain him, unless counsel does.

Mr. Cluck: No objection.

The Court: You are excused, Mr. Meredith.

Q. Will you state your name?

A. Robert H. Wiley, 5103 Adams Street, Seattle 8.

Q. What is your business?

A. Airport traffic controller, stationed at [29] Seattle-Tacoma Airport at the present time.

Q. Did you occupy that position on January 2, 1949?

A. Yes, sir.

Q. What are your duties as airport traffic controller?

A. Well, to sum it up briefly, it is to expedite the flow of traffic in the air around the airport, landing and taking off, as well as keeping a visual eye on all aircraft, trucks, vehicular traffic on the airport that might be a hazard to any moving aircraft landing or taking off, and to coordinate with the Weather Bureau and other agencies involved in expediting the flow of traffic.

Q. Do you make any weather observations?

(Testimony of Robert Wiley.)

A. We make all weather observations when the visibility is three miles or less than three miles. That is visibility only, not ceiling.

The Court: You say "we" in answer to the question. Would you try to relate your answer in terms that are absolutely responsive?

Q. Would the reporter read the last question, please?

(Last question read by reporter.)

A. I do make weather observations.

Q. Were you on duty at the time of the crash of the airplane in which these Yale boys were killed and injured?

A. Yes, sir.

Q. Do you know what the official record of [30] visibility was at Boeing Field on January 2, 1949, at the time this aircraft took off?

A. Well, according to the Weather Bureau reports, this copy that I have here, one-quarter of a mile clear and one-quarter. However, I could not state definitely whether I took that observation personally or not. There was one other man on duty with me who was also qualified to take that responsibility. I would have to look at the record and see whose initials are on it. I was in charge of the shift. It was my responsibility to see that whatever his observation was done correctly. However, I might not have initialed the contact at the time.

Q. Do you have any opinion as to whether or not the official forecast of visibility as shown upon Defendant's Exhibit A-3 is or is not the correct

(Testimony of Robert Wiley.)

and official record of visibility at the time this plane crashed?

A. I am not sure that I understood that question. However, I believe that the Weather Bureau record as shown here in the testimony is correct as to that matter.

Q. Do you have Exhibit A-3 in front of you?

A. No, I do not now. The time here involved was approximately 2207, is that correct, 10:07 p.m.?

Q. That is the entry that is made opposite 2207. It says aircraft accident.

A. Yes. One-quarter mile, that is correct, [31] yes.

The Court: That relates to visibility?

The Witness: That is visibility, yes, sir. As Meredith stated, there wasn't any ceiling. We had thin obscuration at the time, and that was explained.

Q. On January 2, 1949, how long had you been working down there at the airport?

A. I went to work for the CAA at Boeing Field, at Boeing Tower, on March 1, 1943. I have been there continuously from that time until the time of the accident.

Q. During that period of time, have you had opportunity to hear a good many planes take off?

A. Definitely, yes, sir.

Q. Have you had any flying experience yourself?

A. Yes, I hold a pilot's license.

Q. How many hours?

A. Approximately 400 hours, with probably pretty close to 100 hours of Link time, which does

(Testimony of Robert Wiley.)

not mean a great deal except it is simulated instrument time.

Q. Did you hear these motors when they were what they call revved up or run up prior to the take-off? A. Yes, sir, very distinctly.

Q. Will you describe how they sounded to you with respect to whether they sounded normal?

A. As I recall it, the aircraft had been cleared into position sometime prior to his take-off, due to the fact that [32] he was the only active aircraft on the field at the time or in the air. He was sitting on the end of the runway and when he finally received his clearance for take-off——

Q. Just describe the sound of the motors.

A. He revved up one engine and then he revved up the other. They both appeared, as far as I could tell, absolutely normal, and we even commented in the tower at the time, the other boy that was on with me, that we could tell when he started his take-off run by the way the power was being applied. You could hear the aircraft approachnig what would be almost the center of the field if he was over the runway. However, as it turned out, he wasn't over the runway; he was nearer to me than he was to the runway when I picked him up, but everything sounded absolutely normal.

Q. Could you see the airplane when it was revving up its motors? A. No.

Q. About how many feet away from you was the airplane at that time?

(Testimony of Robert Wiley.)

A. I would say 2100 feet would be a good average, north of me.

Q. You have described the sound of the motors as they were warming up. How did the motors sound during the take-off? A. As normal.

Q. Did you notice anything unusual about them at all? [33]

A. Nothing unusual at all, very even and normal.

Q. Power seemed to be applied evenly?

A. Yes, sir.

Q. Motors seemed to be synchronized evenly?

A. As far as I could tell, yes, sir.

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. Do you recall seeing low ground fog on the field that evening? A. Yes, sir.

Q. The depth in feet would vary depending on the place on the field, is that correct?

A. Very definitely that night, yes.

Q. It was variable from minutes to minutes?

A. Very variable.

Q. And you don't know what the visibility was looking down the runway south from a position at the north end of it, do you?

A. No, I would have no way of knowing that.

Q. In the course of your performance of duties there, have you found it unusual that a pilot could see the full length of the runway whereas you in the tower could see only a limited distance?

(Testimony of Robert Wiley.)

Mr. Matthews: Objected to as incompetent, irrelevant [34] and immaterial, argumentative.

The Witness: Would you read the question, please?

(Last question read by reporter.)

The Witness: No. I have had occasions where the pilot has told me that he could see the full length.

Mr. Matthews: I object to what some pilot told him.

The Court: I think the answer should remain as "no." The objection is sustained to the addition of the explanation.

Mr. Cluck: May I make sure the witness understood the question?

Q. (By Mr. Cluck): When you said no, Mr. Wiley, did you mean to say that it wasn't unusual that the visibility of the pilot could differ from the one in the tower? A. That is correct.

Mr. Matthews: Objected to as improper cross-examination.

The Court: The objection is overruled.

Q. In other words, the witness says, no, but actually as is clear, meant yes?

A. What I meant to say was that there are times when the pilot, I believe, can from his point of view see the full length of the runway whereas we are unable to, especially at Boeing Field.

Q. When you said "especially at Boeing Field," did you have some unusual conditions in mind at

(Testimony of Robert Wiley.)

that field that [35] might distinguish it from others?

A. Well, I think so. This isn't official, it is only my own thought on the deal. We are kind of down in a cup there where the fog drifts over one hill and drifts up over another one. You are not on a flat plane where the wind can pick it up and blow it over an extended area.

Q. Are you in charge of maintaining communication with pilots taxiing up to the point of take-off on a runway?

A. The pilot is required by Civil Air regulations, the minute he starts his engines, he is to contact the tower, no matter whether he taxis or where he is going. If he is going to be anywhere near a taxiing area, landing or taking off area, they are to contact us before they move the airplane.

Q. Did you have such contact with pilot Chavers in the subject aircraft on the evening of January 2?

Mr. Matthews: Objected to as improper cross-examination, unless he wants to make this man his own witness.

Mr. Cluck: This is preliminary, Your Honor, but counsel covered the matter of weather observation presumably as it might bear upon the matter of take-off. He did not supply the detail with respect to this witness' communication with the actual pilot who was taking off. It seems to me that is a part of the general subject matter concerning which there was inquiry on direct.

(Testimony of Robert Wiley.)

The Court: The objection to the question asked is [36] sustained with leave to ask the witness if he was told by this pilot anything about the visibility.

Q. Were you told by pilot Chavers anything about the visibility at the north end of the runway?

Mr. Matthews: I object to that as hearsay.

The Court: Is there any response to the hearsay objection?

Mr. Cluck: Yes, Your Honor. This is a matter of regular procedure of clearance of the aircraft. It is verbal actions which are taking place between the pilot of the aircraft and the witness. It is the means by which he gets some of his observations, and it is the means by which his data is communicated with pilots, a regular part of clearance procedure as he has testified.

Mr. Matthews: We have had no opportunity to cross-examine a witness that made such claim. If counsel has any witness that was at the north end of the field that would so testify, that would be one thing, but to permit testimony of a statement made such as this, would seem to me certainly is clearly hearsay.

The Court: Is there any agency in a matter of this sort which would cause an exception of the hearsay to apply?

Mr. Cluck: There isn't any agency, no, Your Honor, but this question is simply part of a general subject [37] matter of what occurs between the tower and the pilots. I might say this is a rather

(Testimony of Robert Wiley.)

unusual situation in the respect that concededly the CAA and regular operating procedures of aircraft require communication back and forth between tower and pilot as part of the official procedure by which aircraft take off, and we feel it therefore comes within the hearsay exception in the respect that he indicated this pilot was taking off on the night in question and was complying with the applicable procedures, and it should be pertinent to see just what passed between the tower observer in charge, in official charge of that procedure and the pilot who was taking off in accordance with it.

The Court: Mr. Matthews, I am inclined to think that the fact as to whether or not any communications were conducted between the pilot and—have you anything else to respond to the last suggestion that communication may be shown under the circumstances?

Mr. Matthews: I am not aware, Your Honor, of any such rule as counsel mentions, that simply because it might be customary when one man went off duty at night to talk to the janitor or have a conversation with any number of people—it certainly seems to me to be hearsay to permit testimony of some statement made by a witness that we have no opportunity to cross-examine. [38]

The Court: I am more inclined to sustain the objection because it is a result of the Court's unsolicited suggestion than anything else. If it should be erroneous, it being a matter which the Court suggested with being requested to do it, I would

(Testimony of Robert Wiley.)

have more concern about it, and I think for that reason more than any other the Court will sustain the objection. You may proceed.

Q. (By Mr. Cluck): Mr. Wiley, you stated, I understand, it is part of your duties to give taxi directions to pilots on the field? A. Yes, sir.

Q. Did you give such directions to pilot Chavers on the evening of the take-off?

A. I gave him such instructions, to NC 79025.

Q. Were you acquainted with pilot Chavers?

A. I had met the man in the tower on official business, as a routine pilot coming up to the tower. I did not know him personally, just to speak to him in the hall and call him by name, but that's all. I had other contacts with him several times.

Q. But you were in regular touch with the pilot of this aircraft in the course of its taxiing to the end of the runway and immediately prior to take-off, is that correct? A. Yes.

Q. Could you refer simply to refresh your memory to any [39] notes you may have taken and tell us what occurred? Let me ask you, did you take notes on what occurred at that time as far as your giving taxi clearance with the pilot of this aircraft?

A. We have an electrical recording machine that is attached to our microphone relay system, and everything that the tower operator says, regardless of who it is or who it is to or what frequency it is on, it is automatically transcribed at the instant

(Testimony of Robert Wiley.)

it is put on the air. All we have to do is play the record back, and if it's all there, it's there; if it isn't that's it.

Q. Did you cause that to be transcribed as far as the record applicable to this airplane is concerned?

A. Yes, sir, I did.

Q. Did you make any notes with respect to answers to your directions received from the pilot?

Mr. Matthews: Objected to. I think now he is trying to circumvent the Court's ruling. As far as the statements, self-serving statements made by the pilot, I think they are clearly hearsay and objectionable on that ground.

Mr. Cluck: I might add this word. I think there is a little confusion in counsel's application of the hearsay rule, and I will just illustrate it in this way. If we were to describe an Army movement, it would be pertinent to recite what the orders were of the captain [40] to whoever it was they were given, not because they are cited necessarily for the truth of the matter asserted, as it is a part of the procedure of the movement. Likewise, here these directions are an official part of the take-off procedure, and a necessary part of the procedure also are the replies. One direction is dependent upon the reply received from the preceding one, so that it is offered as a description of the official take-off procedure within the direct meaning of this witness, and that is the purpose of a number of these questions that relate to that same subject matter.

(Testimony of Robert Wiley.)

Mr. Matthews: The take-off procedure can be described, and I think has been described, without bringing in hearsay statements of witnesses on a material point in this case which we are helpless to cross-examine.

The Court: Your objection to what the pilot may have said and what this witness may have recorded at the time may be based on two different things. This question may be asked and you may see later whether or not you object to any further questions. Read the question.

(Last question read by reporter.)

A. Yes.

Q. Will you refer to the notes that you have taken concerning the official taxiing procedure and tell us exactly what occurred as you remember? [41]

Mr. Matthews: That is the same objection, if he is attempting to read any other than statements he made. I haven't any objection to any statement he may have made, but as to statements made by the pilot, I think that is definitely hearsay.

Mr. Cluck: The confusion arises from the point that this is a matter which is submitted not necessarily for the truth of any factual matters asserted by the pilot, but as a regular part of the official taxiing and take-off procedure.

The Court: What do you seek to prove by this line of inquiry and what makes it material and admissible?

Mr. Cluck: What we are seeking to show, your

(Testimony of Robert Wiley.)

Honor, is exactly what occurred as far as the transmittal of weather information and procedure of taxiing and clearing the airplane for take-off.

The Court: Why do you not ask him about the weather? You have already done that, but if there is anything else about the weather you wish to ask this witness about, you had better get at that. I am going to sustain the objection unless you confine the questions to him as to what was then done or recorded from oral statements, unless you confine your questions to what he said or did, this particular witness. Ask him about the weather, if he observed anything about the weather. [42]

Mr. Cluck: We might still, your Honor, to comply with the Court's direction, we can make an offer of proof later as to what the pilot said or did. May we ask the witness to give us the sequence of what occurred as far as the tower directions or statements to the pilot?

The Court: How long will that take?

Mr. Cluck: Only about ten minutes.

The Court: Court will be adjourned until tomorrow morning at 9:30.

(At 5:15 o'clock p.m., Tuesday, October 10, 1950, proceedings adjourned until 9:30 o'clock a.m. Wednesday, October 11, 1950.)

(Testimony of Robert Wiley.)

October 11, 1950, 9:30 A.M.

The Court: You may proceed in the case on trial.

Q. Mr. Wiley, what other transport aircraft, if any, took off from Boeing Field within a period of approximately half an hour prior to the accident in question?

Mr. Matthews: Objected to as incompetent, irrelevant and immaterial to any of the issues in this case.

The Court: Will you state the purpose of the question?

Mr. Chuck: Yes, if your Honor please. The matter upon which defendants rely principally as a basis of [43] voiding liability on their policy are conditions of take-off at Boeing Field. Testimony has been introduced by the defendants as a part of their direct examination relating to weather minimums, including visibility, particularly frost or icing conditions, and so on. We expect to show by this witness very briefly that during the period covered by such direct examination several scheduled and non-scheduled transport aircraft took off from this same runway, at the north end of it, and it seems to us that is a part of the evidence going to show the actual flight conditions on that runway. The presumption would be that aircraft, particularly scheduled air line aircraft, would be observing the law or otherwise would be conforming with safety standards, and it is just a part of the evi-

(Testimony of Robert Wiley.)

dence which the Court can hear and evaluate for what it thinks it is worth after hearing the whole case.

Mr. Matthews: If the Court please, that would require us to go into the condition of the weather at the time these other airplanes took off. It has already been testified to that weather conditions were extremely variable; that one moment visibility would be one thing, the next minute visibility would be something else. The fact that some other transport pilot did or did not abide by the rules and regulations of CAA doesn't mean a thing. [44] Some other non-scheduled carrier might have also violated these rules. It seems to me we should confine our inquiry here to the conditions of this airplane at the time it took off, the conditions of weather and visibility at the time this airplane took off, not as to conditions at other times when other airplanes took off.

The Court: The Court believes that the conditions of flight as affecting safety of take-off of the plane in question at or about the time it attempted to take-off are material, and as to whether or not some particular is more remote than some particular testified to surrounding and affecting the attempted take-off of the plane in question, that is a matter of weight rather than admissibility, and the Court overrules the objection. Read the question.

(Last question read by reporter as follows:

“Q. Mr. Wiley, what other transport aircraft,

(Testimony of Robert Wiley.)

if any, took off from Boeing Field within a period of approximately half an hour prior to the accident in question?")

A. According to my notes here——

The Court: I do not believe you are authorized to read into the record your notes. You should answer the question if you can.

Q. You may refresh your recollection, if I may interpose.

Mr. Matthews: Your Honor, the notes he has is testimony [45] before the CAB, and counsel objected successfully to my even letting the weather woman refresh her recollection. I think under the circumstances, if we are going to apply the same rule, it should be applied to this witness. That is the testimony, wasn't it, that you prepared and gave before the CAA?

The Witness: Yes, sir.

Mr. Cluck: If the Court please, the notes that I am referring to were those taken as a regular part of the procedure, irrespective of CAB hearings. The witness testified yesterday that a recording is kept showing the data with reference to take-off reports on the departures, and he has other data in the tower, and I am asking him not to testify on the basis of what his notes say, but on the basis of what his recollection is, using notes simply as the basis of refreshing his memory.

The Court: There is a lack of clarification. The witness has answered a question by Mr. Matthews

(Testimony of Robert Wiley.)

that the notes to which he actually refers in response to inquiring counsel's advising him that he may refer to something, is the testimony that he gave before the CAB or CAA. In view of that record, I say that the objection is well taken and is sustained. It does not prevent his referring to official notes. The Court's ruling does not relate to possible notes made by this witness in the [46] course of his work at the time the work was done by this witness.

Mr. Cluck: In deference to the Court's ruling, we will defer further questions of this witness until we have had an opportunity of checking further on the notes. No further questions.

Mr. Matthews: No questions.

The Court: The witness is excused from the stand. Does either side ask to reserve the right to recall the witness?

Mr. Cluck: Yes, we do, your Honor.

The Court: The witness will remain in attendance until later excused.

KENNETH BUZZELL

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name, please?

A. Kenneth Buzzell.

(Testimony of Kenneth Buzzell.)

Q. Where do you live?

A. 12436 20th South.

Q. What is your occupation? [47]

A. Mechanic, aircraft mechanic.

Q. How long have you been engaged in that business? A. Ten years.

Q. By whom are you employed?

A. West Coast Airlines.

Q. Where are you stationed?

A. Boeing Field.

Q. How long have you been stationed at Boeing Field? A. Five years.

Q. How long have you been with West Coast?

A. Three and a half years.

Q. By whom were you employed prior to that?

A. Northwest Airlines.

Q. Stationed where?

A. At what time, sir?

Q. Well, just generally during the time you worked for them, just briefly. Was it here in Seattle? A. Part of the time.

Q. About how long here at Seattle?

A. A year and a half.

Q. What certificate or rating do you hold as an airplane mechanic? A. An A and E license.

Q. What do you mean by an A and E license?

A. Aircraft and engine. [48]

Q. Who issues that license to you?

A. CAA.

Q. What have been your duties with these airlines that you have referred to?

(Testimony of Kenneth Buzzell.)

A. They haven't been all of one nature. They have varied some.

The Court: Can you tell what some of the duties were? A. Yes, sir. Line maintenance.

The Court: By "line," what do you mean?

A. Line maintenance in connection with aircraft has to do with arrival and departure of aircraft.

The Court: What significance does that word line have to you?

A. It means ramp procedures, ramp and periodic checks, and it is aside from overhaul.

Q. During the time that you have been stationed down at Boeing Field, have you been working at a position where you could hear the sound of airplane engines when they took off for flight?

A. Yes, we hear them every day.

Q. How close is your shop located to the runway?

A. The same distance as would be from the tower to the runway.

Q. Can you hear quite clearly the sound of airplane motors as they take off on the runway going north and south? [49] A. Yes.

Q. Do the airplanes in such a take-off pass right by your shop? A. They pass by, yes.

Q. About how far is your shop from the east edge of the runway, if you know?

A. Mr. Wiley I think could tell closer.

Q. Anyway, it is close enough that you can hear clearly the sound of motors as they take off?

(Testimony of Kenneth Buzzell.)

A. Yes.

Q. Were you stationed at your job with the West Coast Airlines on the night of January 2, 1949?

A. Yes, sir.

Q. State whether or not you heard the airplane in which these Yale boys took off, this Douglas DC-3 No. NC 79025, rev up its engines and take off?

A. You could hear it very clearly.

Q. Were you inside your shop or outside the shop when you were listening to these motors?

A. Inside the shop while they were at the north end prior to take-off, and outside the shop the time of take-off.

Q. Why did you happen to go outside the shop at the time of take-off?

A. To watch the take-off.

Q. Was there any particular reason why you were interested [50] in this take-off?

A. Yes.

Q. What was that reason?

A. Take-offs at Boeing Field in——

The Court: Do not go off into that discussion. Just answer the question directly.

A. Marginal weather.

Q. Could you see when you went out to the outside of your shop, could you see the north end of the runway?

A. No.

Q. Could you see the airplane to which I referred at the north end of the runway?

A. No.

Q. Could you see the south end of the runway?

A. I don't know, sir.

(Testimony of Kenneth Buzzell.)

Q. Was there anything unusual about the sound of the motors while they were revving up or during the take-off? A. Not that I could tell, no.

Q. Did it appear to you that the power was being applied evenly and uniformly?

A. It seemed so.

Q. As far as the performance of the motors is concerned, was there anything abnormal or unusual about what you heard or saw?

A. No, nothing. [51]

Q. Do you know what the condition of the ground was with respect to whether there was snow and ice on the ground at this time?

A. Yes, sir.

Q. What was that condition?

A. It was icy.

Q. Any snow?

A. No, I don't remember, sir.

Mr. Matthews: That is all.

Cross-Examination

By Mr. Chuck:

Q. As I understood your background, you have not had any experience in observing weather in a professional way at all, have you?

A. How do you mean, professional?

Q. You haven't served as any weather observer?

A. No, sir.

Q. The judgments that you expressed with respect to behavior of engines was based solely on the sounds that you heard, is that correct?

(Testimony of Kenneth Buzzell.)

A. That is correct.

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. Have you had any flight experience? [52]

A. Some.

Q. Do you hold a license of any type as a pilot?

A. Yes.

Mr. Matthews: That is all.

The Court: Step down. Call the next witness.

EMMETT FLOOD

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name, please?

A. Emmett G. Flood, Jr.

Q. What is your business?

A. I am an airline captain.

Q. What training and experience have you had in the flying of airplanes?

A. Well, I have got a total of 6,500 hours. I hold an airline transport rating, 1050 h.p. to 12,000 h.p.

Q. Of that 6,500 hours, how much of that has been in multiple engine planes?

(Testimony of Emmett Flood.)

A. I would say approximately 6,000 hours.

Q. Have you had any experience flying under icing conditions?

A. I flew in the Alaska Territory for a period of three [53] years. I have a thousand hours of actual instrument time, icing and so forth.

Q. Three years in Alaska, you say?

A. Yes, sir.

Q. Were you at Boeing Field on the night of January 2, 1949, the occasion when the Douglas DC-3 No. 79025 attempted to take off on runway No. 13?

A. I wasn't there at the time of take-off. I had refused to fly the airplane and went home at approximately 1930.

Mr. Cluck: Your Honor, I object to this testimony. I suggest that the witness answer the question instead of volunteering information.

The Court: Try to make your answers responsive to the question and do not make any additional remarks not called for by the question.

Q. How did you happen to go to the airport that night?

A. I was called by Mr. Leland to take the flight.

Q. That is Mr. William F. Leland?

A. That is correct, sir.

Q. You were called by him?

A. Yes, sir.

The Court: To take the flight?

A. To take the flight, yes, sir.

The Court: You mean by that what? [54]

(Testimony of Emmett Flood.)

A. As a member of the flight crew. It wasn't clear to me just what member, they called me up at the last minute. I didn't work for the company before. The company for which I was employed at Boeing Field quit business on December 27, and they called me. I had nothing to do with the company before.

Q. What time did you say you arrived at the airport? A. At approximately 1900.

The Court: Would you say by ordinary clock what time that was?

The Witness: 7 p.m., sir.

The Court: If you can, in speaking of time I wish you would use the ordinary terminology of time familiar to laymen.

The Witness: Yes, sir.

Q. Did you see this aircraft at that time?

A. Yes, sir, I did.

Q. What was its condition?

A. It had an accumulation of ice, frozen slush, on both wings, both on the top surface and the under surface of the wings. The top of the fuselage, I noticed, from a point five feet from the front to the tail had approximately four to five inches of snow on.

Q. What was the condition of the underneath side of the wings? [55]

A. Well, it looked to me like in the attempt to wash the wings, with cold water, which the mechanic told me he did, that the water had—it

(Testimony of Emmett Flood.)

seeped over, I mean just froze on the underpart of the wings.

Q. Had it frozen in a smooth manner, or otherwise?

A. No, I noticed a few icicles dripping water. The temperature was 22 that night, I think, and you could see that water was applied to the aircraft. I noticed icicles on the underpart of the wing, various places.

Q. Did you have any discussion with anyone about the condition of the plane, and particularly as to whether or not it was in any condition to be flown?

A. Mr. Chavers asked me to inspect the airplane when I came to the airport.

Mr. Cluck: Your Honor, I object to this as being hearsay.

The Court: Mr. Chavers, that is one of the pilots?

Mr. Matthews: Yes, your Honor.

The Court: As I recall, yesterday on cross-examination objections to inquiries as to what the pilot said were sustained.

Mr. Matthews: I will withdraw the question, your Honor.

Q. Did you make any statement to either Mr. Jandl or Mr. Leland or Mr. Chavers concerning the condition of the airplane with respect to whether or not it was in a safe [56] condition to be flown? Answer yes or no.

Mr. Cluck: I object to that, your Honor, as

(Testimony of Emmett Flood.)

being immaterial and irrelevant, what this witness said to the other parties, if he did say anything. That, by the way, is at 7 o'clock or thereabouts in the evening as far as the testimony so far is concerned.

The Court: The hour of attempted departure was what?

Mr. Cluck: 10:07.

The Court: Read the question.

(Last question read by reporter.)

The Witness: Yes.

The Court: That may be answered and the answer will remain, but as to whether or not he may be asked to now relate what the statement was, if the objection goes to that I will hear the objection.

Q. What statement did you make to Mr.—don't answer until the Court rules—what statement did you make to Mr. Jandl, Mr. Chavers or Mr. Leland?

Mr. Cluck: I object to that question. If the witness is able to tell the Court what conditions he observed a reasonable time prior to take-off, that, of course, would be relevant. So far the witness has testified only he was down at the field three hours and some odd minutes prior to take-off, a circumstance which has not yet been connected with conditions at the time of departure, and [57] then he is asked about remarks he may have made as to conditions then present.

The Court: Statements made about the condition of the plane so far as affecting its safe de-

(Testimony of Emmett Flood.)

parture, safe take-off, if made to Mr. Leland would seem to me not to be subject to the hearsay rule objection. I ask counsel inquiring if he intends to connect up the condition of the plane at the time this witness is asked to speak with the condition of the plane at the time of take-off.

Mr. Matthews: Yes, your Honor, I do.

The Court: Mr. Cluck, do you wish to pursue your objection in view of counsel's promise?

Mr. Cluck: We wish to preserve our objection, your Honor, for the reasons indicated; that what this witness may have said either to Mr. Leland or to anyone else three hours and some odd minutes prior to take-off does not have a bearing either on conditions prior to take-off or on any actions which Mr. Leland or anyone else may have taken with reference thereto.

The Court: The Court rules that with reference to the statements made by this witness to Mr. Leland at the time in question, he may make answer to this question, but that he cannot in answer to this question relate any statement made by the witness to the pilot Chavers.

Q. Just answer this question yes or no. Did you have [58] a conversation with Mr. Leland concerning the ice and frost on this airplane?

A. Yes, I did.

The Court: Let him have an opportunity in this connection to say when he had that conversation.

Q. When did you have that conversation?

A. At approximately 7:15 p.m.

(Testimony of Emmett Flood.)

Q. Will you state what that conversation was?

A. I told Mr. Leland we needed at least 25 gallons of alcohol and I would make an attempt to remove the ice with that alcohol. I didn't know if that would be enough or not.

Q. State whether or not you expressed to Mr. Leland any opinion as to whether or not the airplane in the condition in which you saw it at that time was in a safe condition to take off?

A. I told Mr. Leland it was not in a safe condition to take off.

Q. What did he say to you?

A. He said——

Mr. Cluck: I object to that, your Honor, as being hearsay and immaterial.

The Court: The objection is overruled; I think you should ask him what if anything.

Q. What if anything did he say to you in response to your statement you just referred to? [59]

A. He said, "This is a hell of a time to pull that."

Q. State whether or not Mr. Leland made any statement to you as to his opinion as to whether or not the airplane was safe to take off? Answer yes or no.

A. Say that again, please.

(Last question read by reporter.)

A. Yes.

Q. What was that statement?

A. He said—he rubbed his hand on the wing

(Testimony of Emmett Flood.)

and he said, "It don't look like too much ice to me."

Q. What did you do then?

A. At that time I went up in the cockpit and got my bags and left the airport, went home.

Q. When you got home, state whether or not you called on the telephone anybody connected with the CAA?

A. I called Mr. Mugge, advised him of the discussion that we had at the airport, why I left the airport, and told him I didn't consider the airplane safe for flight.

Mr. Matthews: You may inquire.

Cross-Examination

By Mr. Cluck:

Q. What time did you leave the airport?

A. Around 7:30 p.m.

Q. You knew nothing concerning anything which may have been done to the plane in the way of ice removal after that [60] time?

A. That's right.

Q. You spoke of your request for 25 gallons of alcohol. What kind of alcohol were you referring to?

A. The ordinary alcohol that we use in our propellers, on our windshields to remove ice.

Q. Did you mention the temperature at the time that you were down at the airport? I wasn't too sure.

A. I think, sir, it was 22 degrees, if I remember correctly. I don't remember.

(Testimony of Emmett Flood.)

Q. Did you have occasion to make any observation of that yourself, or are you just testifying by way of estimate?

A. I think on the way to the airport I heard a radio announcer give the temperature at Seattle that evening. That is how I knew it.

Q. What was the extent of your inspection of the ice on the underside of the wings as of 7 o'clock approximately?

A. Well, I inspected the complete aircraft, the under surfaces of the wings, the elevators, the ailerons. I tried to move the ailerons and there was so much frozen slush that I could just about move them. I checked the top of the wings with a flashlight and the under surface of the wings with a flashlight.

Q. What did you find on the top side of the wings?

A. An accumulation of frozen slush, where snow had been [61] removed with water.

Q. Frost, too?

A. No, it was just a frozen slush condition over the entire surface of the tops of the wings.

Q. Then what did you do with the underside?

A. I inspected with a flashlight, noticed there was a frost accumulation where water had dripped over, or sprayed and froze in the attempt to wash it. I figured probably the spray from the hose that Mr. Miner used froze on the under surface of the wings. That is what it looked like to me.

(Testimony of Emmett Flood.)

Q. It was a situation you observed of small frost icicles you mentioned?

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. You said you had had some three years experience flying in Alaska. Have you ever had any experience of attempting to take an airplane off the ground with frost on the wings? A. Yes, sir.

Q. Where did that occur?

A. Approximately thirty days before this incident took place, at Annette Island, Alaska.

Mr. Cluck: Your Honor, I object to this line of inquiry. It is an inquiry apparently directed to relating the circumstances of some undisclosed accident of one [62] kind or another up at Annette, Alaska. What bearing it has in connection with anything so far brought out is certainly far from clear, and it opens up a pretty wide field of inquiry as far as the actual issues of the case are concerned.

Mr. Matthews: The purpose of the question, your Honor, is to show by this witness that he has personally attempted to take an airplane off the ground with much less accumulation of frost on the wing than this airplane had, and I want him to tell what happened to that airplane and ask him his opinion as to that effect of frost on the wing of the airplane, but before asking the effect, I want to

(Testimony of Emmett Flood.)

show his qualifications and experience in that connection.

The Court: The objection is sustained with reference to the details as to the experience. The general question asked, and I believe he has already answered it, as to whether he had any such experience, will stand, but the objection made will be and is sustained.

Q. Mr. Flood, can you explain to us the effect that an accumulation of frost and ice on the wings has upon the lifting qualities and characteristics of an airplane?

A. It completely destroys the lift characteristics.

Q. What effect if any does it have upon the stalling speed of an airplane?

A. Well, it causes your wing to stall out. It just [63] won't fly, build up speed. I mean it creates a stall, in other words, which is very, very dangerous in take-off.

Q. State whether or not an accumulation of frost on a wing is more dangerous during take-off than it would be in flight?

A. Well, it probably wouldn't form on that part of the wing in flight. It is a ground condition. You will get ice on the leading edges of the wings or propellers, and so forth, but on the top surface of the wing or under surface it won't form in flight. It was a ground condition.

Mr. Matthews: That is all.

(Testimony of Emmett Flood.)

Recross-Examination

By Mr. Cluck:

Q. You made the statement that frost, or frost and ice, whatever it is you are referring to, completely destroys lift characteristics. What the effect is as to in relation to lift characteristics depends upon the amount and nature of an accumulation in a particular instance, does it not?

A. I would say it is pretty hard to judge just how much you need not to cause your wing to stall out. I have seen it with just a little bit and——

Q. Irrespective of what you may have seen, please answer the question; what the effect if any is on the lifting characteristics of an airplane depends in large part upon the amount of frost and its nature at the particular time of [64] take-off, is that not true? A. No, that is not true.

Q. You think the same effect would apply whether there is a little or a large amount of it?

A. That is correct.

Q. Even though there were just a few specks of frost, still the lift characteristics of the wing would be completely destroyed? A. That is correct.

Q. Just a few crystals on top the wing?

A. By a few, I do not know how many you mean.

Q. I tried to discover whether you have some notion as to where the line falls. You have just testified it doesn't make any difference whether the amount is very small or not, just a few particles of

(Testimony of Emmett Flood.)

frost might destroy the lift characteristics of a wing. Do you want to change that testimony?

A. No, that is correct.

Q. As an experienced pilot, you still wish to be understood as saying that even a few crystals put on the plane, as you would salt out of a salt shaker, would still destroy the lift characteristics of the airplane?

A. Negative. I am referring to a rain cloud that may pass over the airport at the time the airplane is on the ground and completely cover it. I mean it don't have to be a large amount, that is what I am referring to. [65]

Q. I am asking you specifically, irrespective of clouds or anything else, whether a very small amount of frost will destroy the lift characteristics of the wings?

A. Well, if you put two or three drops on it, I don't think it would, but weather conditions—I mean frost is caused by clouds.

Q. Let's not go into the history of the formation of frost, and so forth. Just give us a little more of your opinion, if you have one, as to whether even a small or minute quantity of frost will destroy the lift characteristics of the wings?

A. Yes.

Q. You didn't see this accident at all, did you?

A. No, sir.

Mr. Cluck: That is all.

(Testimony of Emmett Flood.)

Redirect Examination

By Mr. Matthews:

Q. Have you had any actual experience in the flying of an airplane where there was a very small amount of frost on the wing and experienced difficulty in taking off? Answer yes or no.

A. Yes, sir.

Q. Will you tell us how much frost was on the wing of that airplane when you had difficulty?

Mr. Cluck: I object. Your Honor, this is going into [66] the same matter the Court already ruled on, the circumstances of the particular case.

Mr. Matthews: I think you opened it up.

Mr. Cluck: No, we didn't.

The Court: The objection is sustained.

Mr. Matthews: That is all.

Mr. Cluck: What are you doing now?

The Witness: I am an airline captain.

Mr. Cluck: Employed by what concern?

The Witness: Do I have to answer that?

Mr. Matthews: Yes, go ahead and answer it.

The Witness: With the Flying Tiger Line, Inc.

Mr. Cluck: That is all.

The Court: Step down. Call the next witness.

RICHARD DAVISON

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name?

A. Richard Charles Davison.

Q. What is your business?

A. Aircraft mechanic, engine mechanic. [67]

Q. What ratings, if any, do you hold from the CAA?

A. Engine license.

Q. How long have you been engaged in this line of business?

A. Approximately 11 years.

Q. By whom are you employed?

A. Pacific Airmotive Corporation.

Q. Where are they located?

A. On Boeing Field.

Q. How long have you been with them?

A. Approximately nine years.

Q. What is your job down there?

A. Shop superintendent.

Q. How long have you been shop superintendent?

A. At this location, approximately three years.

Q. Were you shop superintendent of this concern on January 2 and during the month of January, 1949?

A. Yes.

Q. State whether or not at the request of the Civil Aeronautics Board you made an examination

(Testimony of Richard Davison.)

of the engines on a certain airplane described as a Douglas DC-3 No. 79025?

A. I made an examination of two engines. I do not recall the specific aircraft number.

Q. State whether or not it was the airplane that was involved in the crash on January 2, 1949, when the Yale students were killed and injured at Boeing Field? [68]

A. It was.

Q. What examination did you make of the engines following the crash?

A. We took the engines and made a visual external examination first, and then disassembled the engines for an internal visual examination.

Q. Will you describe briefly the nature of that examination and the purpose of it?

A. Well, the nature was, as fully as possible, a description of the actual shape of the engines as we received them, and the purpose of it was for this report to the Civil Aeronautics.

Q. I mean, state whether or not your purpose was an effort to determine whether or not from your examination you could find any evidence of power failure or malfunctioning of the engines?

A. That was the actual purpose, to determine the actual condition of the engine regarding any power failure or anything other than normal engine.

Q. State whether or not you made a complete and thorough examination of the engines and/or its component parts?

A. We did.

Q. From your examination were you able to find any evidence of malfunctioning or power failure in the engines?

(Testimony of Richard Davison.)

A. Nothing from the remains of the engine. [69]

(Record of external visual inspection marked Defendant's Exhibit A-4 for identification.)

Q. Handing you what has been marked for identification Defendant's Exhibit A-4, I will ask you if you will examine that document and state whether or not——

The Court: State if you know what that document is, if you know what it is.

Q. State what the document is. Just answer yes or no. A. Yes.

Q. Is that document signed by you?

The Court: May I suggest the proper answer to the form of question which I suggested, state if you know what that document is, would permit the witness to answer what it is, assuming in making the answer that he does know.

Q. What is that document?

The Court: If you know what it is.

A. It is a record of our inspection of the engines.

Mr. Matthews: I offer Exhibit A-4 in evidence.

Mr. Cluck: Your Honor, I would like to ask the witness a question or two before making objection.

The Court: If you believe that it reasonably relates to the admissibility of the document——

Mr. Cluck: Yes, it does.

The Court: Then you may do that. [70]

Mr. Cluck: Did you prepare that exhibit?

The Witness: Yes.

(Testimony of Richard Davison.)

Mr. Cluck: For whom did you prepare it?

The Witness: For the Civil Aeronautics.

Mr. Cluck: Was it used as a part of the hearing conducted by the Civil Aeronautics Board?

The Witness: That I do not know.

Mr. Cluck: Did you furnish it to them in connection with their investigation of the accident which is the subject matter of this suit?

The Witness: Yes.

Mr. Cluck: I object to the introduction of the exhibit on the grounds previously indicated, your Honor. He does say that he doesn't know whether it was used, but it was, he said, prepared at the request of the Civil Aeronautics Authority immediately after the accident.

The Court: Will you read the statute or regulation which was cited yesterday on a subject which seems to me to have been the type of subject which you claim this is?

Mr. Cluck: 49 U.S.C.A., Sec. 581. I will get the code and read your Honor the full text, if it is desired, but the applicable part reads as follows: "... no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted [71] as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."

The Court: Would you say why this does not come within the scope of that statute?

Mr. Matthews: Your Honor, the CAB did pub-

(Testimony of Richard Davison.)

lish a report of this investigation. This, however, is not that report or a part of that report. I have the report of the CAB here, and I think that in this particular case where the United States is a party and where the United States has conducted an investigation and made findings by people selected by them, that there certainly should be a stop to take a different position, that that statute should not apply in a case where the United States—certainly insofar as the United States is concerned, the statute should not apply even to the report itself, and certainly this document, which I will say to the Court I did not obtain from the CAB, I got it from the office where this man is employed. It is down there at their office. I obtained it from them. The mere fact that they may have turned it over to the CAB, I would not think would make it inadmissible.

The Court: Do you wish to cite any judicial authority in support of your contention distinguishing and excepting this material from the operation of the statute? [72]

Mr. Matthews: No, your Honor, I don't have any authority at this time to cite.

The Court: Not having any authority to support the requested ruling that this is an exception from the application of the statute, the Court is not authorized to hold that it is an exception and sustains the objection, in view of all that has been developed in connection with this exhibit.

Mr. Matthews: No further questions.

(Testimony of Richard Davison.)

Cross-Examination

By Mr. Cluck:

Q. You referred to the remains of the engine. I took it from that you meant that they were subject to a considerable state of destruction at the time you made your inspection, is that true?

A. Yes, I would say they were in a considerable state of destruction.

Q. So that all you could do was to take the remains of the engine as they were made available to you and do your best on that basis?

A. That is correct.

Q. So that considering there had been a fire and consequent destruction, is it not the case that there may have been many things happening to the engines, whatever kind that wouldn't be available to you by way of evidence when you [73] saw the remains?

A. I might answer that this way: externally the engines were considerably destroyed, along with most of the accessories.

Mr. Cluck: That is all.

The Court: You may step down. Call the next witness.

Mr. Matthews: May Mr. Flood be excused?

Mr. Cluck: Yes.

The Court: Mr. Flood is excused.

Mr. Matthews: May Mr. Davison be excused?

Mr. Cluck: As far as we are concerned.

The Court: Mr. Davison is excused.

LAWRENCE STRONG

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name?

A. Lawrence J. Strong.

Q. What is your business?

A. Aircraft instrument technician.

Q. Where do you live?

A. 801 Spring Street.

Q. How long have you been engaged in your present [74] occupation?

A. About nine years.

Q. By whom are you employed?

A. The Instrument Laboratory, Inc.

Q. What is the business of that concern?

A. The manufacture and repair of all types of instruments.

Q. What license, if any, do you hold from the CAA?

A. Instrument mechanic's license.

Q. How long have you held such a license?

A. Since approximately 1946.

Q. You have been engaged in this same line of business continuously since you obtained your license?

A. Yes, sir.

Q. I will ask you to state whether or not you made an examination of the instruments on the Douglas DC-3 airplane that was involved in the

(Testimony of Lawrence Strong.)

crash at Boeing Field on January 2, 1949, that being the crash in which the Yale students were killed and injured? A. I did make the examination.

Q. I will ask you if you have with you the notes and memorandum that you made in connection with that examination? A. Yes, sir.

(Notes of Lawrence Strong marked Defendant's Exhibit A-5 for identification.)

Q. From your examination of the instruments on this [75] airplane, were you able to find any evidence of failure, malfunctioning of any of the instruments?

A. Discounting the damage from fire, water and impact, no.

Q. Calling your attention to what has been marked as Defendant's Exhibit A-5, I will ask you to state if you know what that exhibit is.

A. The exhibit is my notes, typewritten, of the condition in which I found the instruments that I inspected.

Q. I think yesterday you had your own notes in your own handwriting? A. I have.

Q. Do you still have those notes?

A. Yes, sir.

Q. Is this an exact copy of those notes?

A. An exact copy.

Q. Do you have the notes with you?

A. Yes, sir.

(Testimony of Lawrence Strong.)

Mr. Matthews: Mr. Cluck, do you raise any question as to whether or not this is a copy?

Mr. Cluck: No.

Mr. Matthews: I offer this exhibit in evidence.

Mr. Cluck: No objection, your Honor.

The Court: Admitted.

(Defendant's Exhibit A-5 received in evidence.) [76]

DEFENDANTS' EXHIBIT A-5

January 11, 1949.

C. A. A. Repair Station #2738

Jack & Heinz Horizon #AF-45-116225

1. Air filter found fairly clean.
2. Instrument seals burned off.
3. Instrument found uncaged.
4. Front and back pivots and bearings on Gimbal ring found oiled and good, and could have operated.
5. Horizon bar pivots and guide bar found good, and could have operated.
6. Rotor housing pivot and bearing found good, and could have operated, although air seal was found quite dirty.
7. Rotor pivots and bearings found in good shape.
8. Instrument in general was in operating condition at time of crash.

.....,
Larry Strong, Aircraft Instrument Mechanic License #535948.

January 11, 1949.

C. A. A. Repair Station #2738

Directional Gyro Control Box #14262 for Mark III
Automatic Pilot

1. Instrument seals burned off.
2. Instrument found caged and on 30° heading and follow up cord on 320° heading.
3. Instrument cage shaft was clean, showing instrument caged before fire.
4. Upper vertical pivot and bearing found good and could have operated.
- 5: Pick-off plate and shrouds found clean and could have operated.
6. Bottom vertical pivot and bearing found good and could have operated.
7. 90° bearing popped open and retainer plate badly damaged. 270° bearing retainer plate shows no damage. 90° and 270° bearings and pivot balls found clean and lubricated.
8. Rotor shaft and bearings found clean and lubricated and could have operated.
 - A. Instrument appeared to have been in operating condition.
 - B. Greatest damage on 90° end same as D.G. unit.

.....,
Larry Strong, Aircraft Instrument Mechanic License #535948.

(Testimony of Lawrence Strong.)

January 11, 1949.

C. A. A. Repair Station #2738

Model A3 Sperry Gyro Pilot #15954

Bank & Climb Unit

1. Instrument seals burned off.
2. Instrument found in uncaged position.
3. Found to have been very, very hot from fire.
4. Shrouds and pick-off plates badly burned.
5. Horizon bar bearings and pivots still had some oil in them.
6. Front air bearing retainer plate badly damaged and bearing popped open and air seal popped open.
7. Rear horizontal pivot and bearing still clean and contain oil, and could have operated.
8. Rotor housing pivots and bearings dry and rusty, probably due to heat and condensation. Air bearing on rotor housing had some oil in it.
9. Rotor pivots and bearings well lubricated and clean. Instrument could have been operating O.K. at time of crash. Instrument in very poor shape due to corrosion—heat and moisture from fire.

.....,

Larry Strong, Aircraft Instrument Mechanic License #535948.

(Testimony of Lawrence Strong.)

January 11, 1949.

C. A. A. Repair Station #2738

Sperry D.G. #1342

1. Air filter burned too badly to estimate number of hours on instrument.
2. Seals on instrument burned beyond recognition.
3. Instrument cage shaft was clean, showing instrument caged before fire.
4. 90° horizontal Gimbal bearing was found popped open.
5. 90° and 270° Gimbal bearings found well oiled and apparently recently serviced.
6. Rotor shaft and bearing found in good condition (well greased).
7. Top vertical bearing found in good condition.
8. Bottom support bearing found good (pivot sides rusty).
 - A. Instrument appeared to have been recently serviced and could have been operating O.K. at time of crash.
 - B. 90° bearing and 270° bearings show impact damage. 90° bearing was popped open and retainer plate was damaged far worse than 270° bearing.

.....,

Larry Strong, Aircraft Instrument Mechanic License #535948.

Admitted October 11, 1950.

(Testimony of Lawrence Strong.)

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. In this exhibit reference is made to caging of instruments. What does caging of instruments mean?

A. Cage is another word to say lock the instrument, render inoperative.

Q. With reference to what particular directional instruments is that term ordinarily used?

A. Would you state that again, please?

Q. With what particular directional instrument or instruments is that term frequently used?

A. It is used only in respect with gyro instruments.

Q. Would you tell us in as simple language as you can what you mean by gyro instruments?

A. A gyroscopically stabilized instrument.

Q. What would such instrument be on this particular DC-3 aircraft?

A. One instrument was called a directional gyro, used for indicating direction headings which are taken off of the magnetic compass and checked every 15 minutes. The next instrument would be the directional control box, used with the automatic pilot. The next instrument is called a bank and climb box that controls the altitude of the aircraft on the automatic pilot, and the fourth instrument would be the [77] artificial horizon.

(Testimony of Lawrence Strong.)

Q. You mentioned the automatic pilot and the directional control box. Could you tell us briefly in ordinary laymen's language what that is in this particular DC-3?

A. The directional control box controls only the direction of the aircraft.

Q. With reference to vertical or horizontal axis?

A. With reference to heading on a horizontal plane.

Q. Right or left, in other words?

A. Yes, sir.

Q. What does the automatic pilot do? You mentioned that.

A. That is a part of—the automatic pilot consists of two boxes, a directional box and a bank and climb unit. The bank and climb unit is self-explanatory. It controls the bank of the plane and the climb.

Q. In ordinary laymen's language, what is the automatic pilot?

A. It is an automatic device for flying the airplane without human control.

Q. If the automatic pilot is uncaged on take-off, what happens?

A. Nothing would happen. The motors would operate, the instruments would operate, but nothing would happen.

Q. If it is caged on take-off, what happens?

A. Nothing would happen.

Q. If it is uncaged on take-off and the airplane

(Testimony of Lawrence Strong.)

gains [78] speed on its initial run prior to flight, what happens?

A. May I back up a little bit? We might be working our way into a hole here. When I made the statement saying that the cage mechanism renders the instruments inoperative, that was correct, but you also have an on-off valve for your hydraulic pressures that these instruments control; so when you asked me if the instruments were caged what would happen, I said nothing. If the off valve were off, nothing would happen. If the instruments were uncaged and the off valve were off, nothing would happen.

Q. Let's assume that the switch you spoke of was on. I will ask the question this way. To make the automatic pilot operative in controlling direction right and left, what has to be the condition of your switches or instruments?

A. You must have your instruments uncaged. Your directional unit shall have the follow up indexes lined up and your valve must be in the on position.

Q. If those conditions obtained on take-off, what would be the effect as the airplane gained speed on its take-off run?

A. You will have to state the question in a little plainer way. Give me a hypothetical question.

Q. I am taking the same situation you have just mentioned, the condition where the instrument operates. I am asking you what the effect would be on a

(Testimony of Lawrence Strong.)

take-off run as the airplane [79] gained speed if such conditions obtained.

A. If the follow up indexes on the directional unit were lined up and the follow up indexes on the bank and climb unit were in somewhat of a normal attitude for the position of the plane, the valves were turned on, the instruments were uncaged, the aircraft would assume flight.

Q. Irrespective of assuming flight, what would be the effect as far as turning right and left is concerned?

A. It would keep it in a straight line.

Q. If the headings were different than the direction of the runway, what would be the result?

A. At what time? You spoke of the aircraft picking up speed.

Q. Yes. A. At what point in that?

Q. At any time during the time prior to take-off.

A. The minute that the engines had been run for five minutes, everything is operating as we spoke of, the airplane starts down the runway, and as you stated, the follow up indexes were not on the right heading, the aircraft would immediately have full rudder applied to correct for the misalignment of the follow up indexes.

Q. I am speaking now of the operation of instruments, not what the pilot might do. What would be the effect of the automatic pilot in controlling the right and left direction [80] of the airplane?

A. The automatic pilot would immediately apply full rudder, depending on which way the displacement was.

(Testimony of Lawrence Strong.)

Q. And cause the airplane to swerve either right or left depending on what the setting was?

A. With the tail off the ground, it would.

Q. You made some study there, as indicated by the exhibit, in connection with the probable settings of the instruments, did you not?

A. Yes, I noted that in my report for my examination.

Q. You noted that the heading on the gyro and the heading on the automatic pilot were probably the same?

A. Relatively so.

Q. What is the significance of that?

A. It would indicate that the instruments were—both the directional unit of the pilot and the directional unit of the gyro were approximately on the same headings.

The Court: At this point we will take a ten minute recess.

(Recess.)

The Court: You may resume the interrogation of the witness.

Q. Mr. Strong, you spoke of two directional instruments being on the same heading, plus or minus a certain number of degrees. Could you indicate what might cause that? [81]

A. The instruments both being on the same heading, could have been on that heading due to the fact that they were caged on the heading or that they were operating on that heading.

Q. That they were operating on that heading during the course of take-off?

A. Yes, sir.

(Testimony of Lawrence Strong.)

Q. If operating on that heading in the course of take-off, they would cause the airplane to veer from the runway, is that right, unless the pilot took crucial measures?

A. No, sir. If the instruments were operating on the correct heading, the follow up indexes in the directional control box were lined up, would keep the aircraft in a straight flight position.

Q. Yes, but if they were on the wrong heading, on a 90 degree heading or the wrong heading, the opposite would be true, wouldn't it?

A. No, sir. To make it a little clearer, in the directional control box of the automatic pilot you have a directional card, the same as your direction gyro, which we understand. You also have what they call a follow up card, the same markings on it identically. That has to be lined up right to the degree before the automatic pilot is turned on. The gyro controls the card, that is controlled by the caging knob. The bottom card is controlled by a follow up [82] knob that you turn to bring it to the correct heading. When I spoke of both instruments being on the same heading, I meant to say the directional box, gyro control box, wasn't found on the same heading. It had the same impact damage, proving it was on the same heading as the directional gyro.

Q. So that aside from impact damage causing the two instruments to adopt indications of the same heading, it would be operations of the instrument

(Testimony of Lawrence Strong.)

during the course of take-off that would cause it, is that right?

A. No, sir. The instruments could suffer the same impact damage if they were caged or uncaged.

Q. Yes, but apart from the possibility of the same impact damage, the indication would be that they were operating, is that correct?

A. No, sir. There was no clue to whether they were operating or not.

Q. What would cause the two instruments to show the same heading at the time you examined them? The same impact damage, you say, is that correct?

A. Yes, sir.

Q. Is it likely or unlikely that that would be the cause?

A. Would you put the question again, please? I am having a little trouble.

Q. Is it likely or unlikely that impact damage which you mentioned as one of the possible causes would be the [83] real cause?

A. The impact damage was the only clue that I had that the instruments were on the same heading.

Q. What I am getting at is what are the probable causes of their being on the same heading when you found them there?

A. The probable causes of being on the same heading, one would be probability, the other that they were operating.

Q. That they were operating prior to take-off?

A. Yes, sir.

Q. The direction, the compass heading that those

(Testimony of Lawrence Strong.)

two settings would be for would be 90 degrees plus or minus what?

A. The instruments were not found on the runway heading. The impact damage indicated that they were on a 90 degree heading plus or minus 10 degrees either way.

Q. Both of the instruments?

A. Both of the directional units.

Q. I believe you said you found the instruments at the time you examined them in the caged position, is that correct?

A. The directional instruments.

Q. Other instruments were uncaged, is that correct?

A. The bank and climb unit and the artificial horizon were uncaged.

Q. If they were uncaged, you said they would be operating if they were functioning normally, is that correct?

A. Yes, sir. [84]

Q. Could the instruments be caged by impact, that is the directional gyro and the automatic pilot?

A. The directional box and the directional gyro could be caged by impact, something hitting the panel or pushing the caging knobs in.

Q. You spoke of an operative valve in connection with the automatic pilot being off or on. Where is that valve located?

A. That I am not familiar with in a DC-3.

Q. You don't know where it is with reference to the instruments you mentioned?

A. No, sir.

Mr. Cluck: That is all.

(Testimony of Lawrence Strong.)

Mr. Matthews: Was there anything in your examination that indicated to you whether this airplane at the time of the take-off was or was not on instruments? Could you tell from your examination?

The Witness: No, sir.

Mr. Matthews: That is all. May this witness be excused?

Mr. Cluck: Yes.

The Court: Mr. Strong is excused.

R. P. JANDL

called as an adverse witness by and on behalf of defendants, having been previously duly sworn, was examined and testified as follows: [85]

Direct Examination

By Mr. Matthews:

Q. Will you state your name?

A. R. P. Jandl.

The Court: You were on the stand yesterday and have already been sworn?

The Witness: Yes.

The Court: The witness Jandl is now on the stand for further examination.

Q. Did you receive from the United States Marshal a subpoena duces tecum to bring with you certain records concerning the airplane which is the subject matter of this litigation? A. Yes.

Q. You have that subpoena with you?

A. Yes.

(Testimony of R. P. Jandl.)

Q. May I have it, please?

Mr. Matthews: Let the record show, Your Honor, Mr. Jandl is called, of course, as an adverse witness.

The Court: Let the record show Mr. Jandl is now called by the defendants as an adverse witness.

Q. How long had you been associated with Mr. Leland in the business of operating this non-scheduled airplane prior to January 2, 1949?

A. I was working with him in the capacity of a public [86] accountant and auditor on his records since about May, 1947.

Q. Did you perform any other duties for him other than strictly services as accountant and auditor?

A. Well, I helped him out in any way I could if I were down there, but other than that I relegated my duties to that.

Q. What duties have you performed for him other than duties of auditor and accountant?

A. If he asked some advice on certain things, buying planes and like that, I would give him that type of advice, or with regard to the operation. I had nothing to do with it as far as that is concerned.

Q. Did you have access to the books and records of the office? A. Yes.

Q. Over what period of time?

A. During this period, the entire period.

Q. That you spoke of? A. Yes.

Q. As administrator of the Leland estate, were

(Testimony of R. P. Jandl.)

all the records of Mr. Leland turned over to you?

A. In view of the confusion at the time I endeavored as assemble all the records. I found I couldn't get them all, though for some reason either the CAA got hold of them or the insurance company requested information, and I turned [87] everything over to them, let them go through the file, pick out whatever they wanted to. Whether they returned it all, I don't know.

Q. The insurance company requested you to turn over the logs?

A. I don't know. I turned over the files, I don't know what they got. As far as the logs are concerned, the logs were always in the airplane.

Q. How do you know that?

A. That was the customary procedure.

Q. Were you ever in the airplane?

A. Yes, I was in the plane. The logs were always in what they call a bag, a pilot bag.

Q. What kind of bag?

A. A pilot bag which had the operations manual and the logbooks and other pertinent data applicable to the plane.

Q. Have you ever examined those logs?

A. No, not other than just know they were there.

Q. Do you know whether they were up to date or not?

A. No, I don't.

Q. You were requested by the insurance company to turn over to them the logs?

A. I don't recall right now at this late date.

Q. What request was made upon you? You said

(Testimony of R. P. Jandl.)

you turned some records over to the insurance company. [88]

A. The insurance company came down, wanted to go through the records. I says, "Here's the pile of records. You go through and pick out what you want."

Q. Were there any logs in those records?

A. I don't believe so, because the logs were in the plane, as far as I know.

Q. On the subpoena duces tecum served on you, you were requested to bring here all logs, maintenance records and books pertaining to the engines, propellers and aircraft log books of that certain Douglas DC-3 airplane No. NC 79025 referred to in plaintiff's amended complaint in the above-entitled action. Do you have those records with you?

A. I couldn't find any trace of them in the records I have.

Q. Any of those records?

A. None of those records, no.

Q. Do you know what became of those records?

A. No, I don't.

Q. Did you ever see any of the maintenance records or books pertaining to the engines and propellers of the aircraft?

A. Yes.

Q. What happened to them?

A. I don't know. I surmise they were in the plane and destroyed in the crash, but I don't know.

Q. Did you turn any such records as I have referred to [89] over to the CAA or CAB?

A. No.

(Testimony of R. P. Jandl.)

Q. Is it your testimony that they didn't have there in the office any maintenance records or books pertaining to the engines, propellers or the aircraft?

A. I said they didn't have them when I took over the records at the time. I don't know what happened to them prior to that. They might have been in the office and taken out.

Q. When did you take over?

A. On the 5th of January, I believe.

Q. Were you down there the night of the accident?

A. I was down there till about 8 o'clock. Then I went home and didn't get down till the next day.

Q. What were you doing down there that night?

A. Mr. Leland wanted to see me before he left the airfield.

Q. What about?

A. About the operation of the business during his absence. He was planning on going to Washington, D. C.

Q. Were you going to look after operations for him during his absence?

A. No, he wanted me to look after his other business interests. He had an operations man there.

Q. Were you down there the next morning after the crash?

A. Yes, I was down there in the morning. [90]

Q. What time did you get down there?

A. About 10 o'clock, I believe. I am not certain of the time.

(Testimony of R. P. Jandl.)

Q. Did you have access to the records that morning?

A. I had access to them, but I—everybody had access to them, as far as that is concerned. Nothing was locked up.

Q. You mean everybody, the general public, or just yourself and the CAB?

A. Anybody in that particular office. There was two outfits who shared the same office. Whoever came in the office could have gone through the files. They were not locked, in other words.

Q. You mean just any stranger that walked in could have carried away the records?

A. I doubt it, no, but anybody in the office could have.

Q. The second group of documents I asked you to bring were all weight and balance forms or manifests and all passenger manifests, books and records giving the names of the passengers and the weight of baggage and the amount of gasoline and oil carried on the west bound flight of said Douglas DC-3 airplane No. 79025 covering the westbound flight of said plane from Bridgeport, Conn., to Seattle, Washington, on or about December 16, 1948. Do you have those records with you?

A. The only thing I could find, going through the [91] records the other day, was a copy of the westbound manifest.

Q. May I see that, please?

A. And a copy of the original weight and balance when he left Bridgeport.

(Testimony of R. P. Jandl.)

Mr. Cluck: We have two or three questions to ask relating to admissibility of this document after counsel has examined.

(Westbound manifest marked Defendant's Exhibit A-6 for identification.)

Q. Mr. Jandl, referring to what has been marked for identification as Defendant's Exhibit A-6, will you state what that is?

A. That is a copy of the manifest of the westbound flight of these particular students.

Q. Where did you get this manifest?

A. I got it—I believe it was returned to me from the person who was in charge of the eastern operation, and he turned it over to me when he came back and checked in his cash and his other accountability of funds.

Q. Who was that person? A. Walt Keith.

Q. Where is he now? A. I do not know.

Q. Was he working for Mr. Leland?

A. Yes. [92]

Q. Is he the man that lined up this westbound trip? A. Yes.

Q. And this westbound manifest which contains the names of these Yale students that came west on the plane was turned over to you by him?

A. Yes.

Q. Was there any other eastern representative representing Mr. Leland besides Mr. Keith? Did he have any other employee back there?

(Testimony of R. P. Jandl.)

A. None other than the pilots who were stationed there, who were going back and forth.

Q. When was this document turned over to you by Mr. Keith?

A. About the middle of January.

Q. What were the circumstances under which he turned it over to you?

A. When he was accounting for the funds he handled any expenses he had.

Q. Did he collect the money for the fares for these Yale students on the westbound trip?

A. Yes. He didn't collect it from the initial students, no, but he collected from the agency who handled the deal.

Q. Then turning over to you the money, and at the same time he turned over to you this westbound manifest?

A. I had the money before, but he was turning over the accountability of it, and during that operation. [93]

Q. In the accountability, was that records kept by him in the ordinary course of business, managing the affairs of Mr. Leland?

A. Yes, records he kept, which weren't very good.

Q. Was this one of the records that he turned over to you? A. Yes.

Q. Would you say that this was a record he kept in the ordinary course of his duties?

A. I would say so, yes.

Q. As eastern agent of Mr. Leland?

(Testimony of R. P. Jandl.)

A. Yes.

Mr. Cluck: Before this exhibit is offered, before the ruling is made on it, I would like to ask certain questions. Has it been offered yet?

Mr. Matthews: No, not yet. I am continuing my identification.

Q. (By Mr. Matthews): Are the names of the students that made the trip or started out on the eastbound trip which ended in a crash, with the exception of one student that I understand did not go back, except for that one student are all the other students the same that were making the eastbound take-off as came out on the westbound take-off?

A. I never checked it, but I surmise it is.

Q. Mr. Jandl, have you made a search to find out if there is any other westbound manifest other than this one [94] that has been marked for identification as Defendant's Exhibit A-6?

A. This is the only one I could find. The CAA requested others, and I know prior to the time I got this there weren't any copies in my possession at the time, because either the CAA or the insurance company or Mr. Houghton's office had copies.

Q. Did you turn over any copies of a westbound manifest to Mr. Houghton?

A. I don't recall, but I might have. I turned over anything he wanted that I could find.

Mr. Matthews: Is there any dispute—I can call Judge Paul, who acted as the administrator and guardian ad litem for these various students—is there any dispute as to whether or not the students

(Testimony of R. P. Jandl.)

who were on the eastbound flight were the same as on the westbound flight, with the exception of one student?

Mr. Houghton: So far as I know, one or two. Anything we have on that, of course, is just hearsay and we are not too sure of it.

The Court: Just say yes or no. There is no need of encumbering the record with a discussion.

Mr. Houghton: We are not prepared to make a statement on that, Your Honor.

The Court: Proceed with your proof. [95]

Q. Mr. Jandl, as administrator of the Leland estate, certain claims were served upon you as administrator for personal injuries and death sustained by these students that were involved in this accident, were there not? A. Yes.

(Stipulation and agreement marked Defendant's Exhibit A-7 for identification.)

The Court: After you have seen it will you as best you can do so make a statement of what it is, if you think you can make a statement that will be acceptable to opposing counsel. If you do not feel you can, do not answer the Court's request.

Mr. Matthews: If the Court please, this is a stipulation and agreement which was entered into between R. P. Jandl, administrator of the estate of William F. Leland, and the defendants in this cause which covers the settlement that was made for all the claims for personal injuries and death covering

(Testimony of R. P. Jandl.)

the students that were on the plane at the time of this attempted take-off.

Mr. Houghton: Your Honor, might I suggest this. We don't want to put Mr. Matthews to any unnecessary trouble in identifying these students, and it occurs to me that if he has some other matters to go into with the witness; if that is what he is doing, attempting to identify the students, probably at noon we could check them and agree [96] on their identity. We were not being arbitrary in refusing to agree to that. We wanted to be sure we were correct about them all being the same ones except one.

Mr. Matthews: I think you know the names of the students that were on the plane, because claims were filed for each one of them and this stipulation sets out their names, and you have signed it. Mr. Jandl has signed it and the Superior Court has approved it, and they are the same names on that westbound manifest. All I want to know is will you admit the names that appear on the westbound manifest, with the exception of one name, are the same students that were on the plane when it took off going east.

Mr. Houghton: Perhaps I could do this. I have not compared the two lists, but I am willing to stipulate that the names on this stipulation are the names of the students who were on the plane going east.

The Court: With one exception mentioned by Mr. Matthews?

Mr. Houghton: What I mean, Your Honor, is

(Testimony of R. P. Jandl.)

that we are willing to agree that all the students whose names appear on the stipulation were on the plane going east, and then it would be a matter of comparing the two lists.

The Witness: That is what I am doing now.

The Court: Proceed. You have not done anything yet.

Q. (By Mr. Matthews): Do you have a copy of that stipulation [97] I have referred to?

A. No.

Q. Have you some way of checking to find out whether these students were the same?

A. That is what I am doing right now.

Mr. Houghton: Might I ask, Your Honor, what he is checking?

A. I am checking the eastbound with the westbound.

Mr. Houghton: He is talking about this piece of paper here, the stipulation.

Mr. Matthews: I will withdraw my question, if he has some other way to identify these students on the westbound manifest, that is agreeable with me. Go ahead with your checking.

The Court: Can you pass to some other subject of inquiry respecting this witness' examination?

Mr. Matthews: I think he will just have to run down a list of names, and it would break the continuity of my examination.

The Court: You may have a reasonable pause to do that.

The Witness: Yes.

(Testimony of R. P. Jandl.)

Q. The answer is yes?

A. The westbound manifest is the same as the eastbound manifest, with the exception of one student.

Q. What is the name of that student? [98]

A. C. Engel.

Q. If I understand you correctly, Exhibit A-6 sets forth correctly the names of the students that were on the plane at the time of the take-off, with the exception of Mr. Engel? A. Yes.

Mr. Matthews: I will offer Exhibit A-6 in evidence.

Mr. Cluck: We would like to have a few questions.

The Court: If you feel they reasonably relate to the admissibility, you may ask them.

Mr. Cluck: They do, your Honor. Did I understand you correctly to say that the first time you saw what you designated as a westbound manifest was the middle of January?

The Witness: Yes.

Mr. Cluck: Did you have anything to do with its preparation?

The Witness: No.

Mr. Cluck: Did you have any knowledge as to how it was prepared?

The Witness: Not immediate knowledge.

Mr. Cluck: Where were you when it was prepared?

The Witness: I was in Seattle.

Mr. Cluck: Where was it prepared?

(Testimony of R. P. Jandl.)

The Witness: In Bridgeport. [99]

Mr. Cluck: Bridgeport, Connecticut?

The Witness: Yes.

Mr. Cluck: Let me ask you this, do you have any direct knowledge about the time or manner of its preparation?

The Witness: No.

Mr. Cluck: Who ordinarily kept the papers designated as manifests?

The Witness: You mean when they were turned into the Seattle office?

Mr. Cluck: At any time. Who was the custodian of them?

The Witness: Well, the clerk in the office, I imagine, or Lyle Lucklichtner, who was supposed to take care of those things.

Mr. Cluck: You were never custodian of them yourself?

The Witness: No.

Mr. Cluck: So that you have no direct personal knowledge about anything appearing on that form, is that what it amounts to?

The Witness: No, no direct personal knowledge.

Mr. Cluck: We object to its admission, and I will be very brief in indicating the grounds. The most liberal rule that counsel could cite is that set forth in the Washington State statute, particularly Remington's Revised Statutes, Sec. 1263-2. We feel that under the [100] provisions of Rule 43 A of this court they would have the right to invoke that statutory provision. That is 1947 statutes, with which

(Testimony of R. P. Jandl.)

the Court is familiar, entitled "Admissibility—Preliminary showing," and reads as follows: "A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the Court, the sources of information, method and time of preparation were such as to justify its admission."

Referring in order to those requirements, which are cumulative, the statute requires first that the custodian or other qualified witness testify as to its identity. We submit that no showing has been made on that score. The witness surmised something, but what happened was that as an accountant he was handed a paper by one Walter Keith, prepared at Bridgeport, Connecticut, which had nothing to do as far as the operations of business are concerned. If counsel wished to call as a witness someone in charge of operations or the particular person having custody of the record, that is a different matter, but certainly Mr. Jandl, who is simply employed in an advisory [101] capacity, is not the witness to be called.

The next thing, testify as to the mode of preparation, the witness indicated he was in Seattle when it was prepared in Bridgeport, and he knows nothing about it.

The further requirement, made in the regular

(Testimony of R. P. Jandl.)

course of business. It is true the witness said he surmised it was made in the regular course of business, but that is all and that is not sufficient.

At or near the time of the act, condition or event. That is not shown.

Finally, if in the opinion of the Court the sources of information, method and time of preparation were such as to justify its admission. Apart from those requirements, here is what defendants are seeking to do, as far as is apparent. They are attempting to show by this piece of paper, an unsigned piece of paper upon which names of the students and their weights are listed, that this airplane at the time of the take-off on January 2 was overloaded. Whether anyone used the scales and put each of those persons on the scales is to be inferred, or whether the inquiry was made simply of the particular passenger as to what his weight was as his opinion, but whether there was any scaling or questions were asked, all of those questions and a lot more certainly would be such as we would be privileged to ask on cross-examination [102] and which we have no opportunity whatsoever to ask at this time. If counsel wished, he had up until this time to take the deposition of Mr. Keith, so far as we know, plenty of time to do that before trial. If that had been done, we would have the opportunity to have our privilege of cross-examination.

We submit that in consideration of all of those things this exhibit is not admissible and that it should be particularly scrutinized in view of the

(Testimony of R. P. Jandl.)

efforts of defendants to prove what they regard—we don't agree with them—but what they regard as an important issue in the case.

The Court: What is the section number of Remington's Revised Statutes?

Mr. Cluck: Sec. 1263-2. That is set forth in the 1947 Supplement, the act passed in 1947.

The Court: You spoke of Rule 43 A. Do you mean the Federal Rules of Civil Procedure?

Mr. Cluck: That is correct, your Honor.

The Court: I will hear counsel offering the exhibit.

Mr. Matthews: If the Court please, the witness testified that Mr. Keith was the only eastern representative that Mr. Leland had, that he was the man that arranged for this westbound flight, that this record, this manifest, was turned over to him as administrator of the estate [103] along with the accounting which Mr. Keith made for the distribution of the money, disbursement of the funds that was charged for this charter, that it was kept in the ordinary course of business and that it has been in his custody and that he knows of no other westbound manifest other than this one, and it seems to me that it being the only record that the business kept or that is available, and since it was found and turned over to this witness by a regular representative, the very man that arranged the flight, that it is certainly admissible as proof of what it purports to show upon its face, because it is their own manifest turned over to this witness by their own employee,

(Testimony of R. P. Jandl.)

the very man that made the arrangements for the flight.

There is no question about where it came from; there is no question but what this was the man in charge of the east flight, and it seems to me if there is anybody that knows who was on the plane and would be the proper person to prepare the manifest, this would be the witness and the proper person that prepared it. It seems to me under those circumstances that it is the best evidence that is possible for us to produce here under the circumstances.

The Court: The objection made is sustained. The Court does not believe that the authenticating proof [104] meets the shopbook rule and it does not meet the rule of any statute that has been cited to the Court. There is a Federal statute on the subject, the terms of which have not been mentioned, and so far as anything that has been shown to the Court yet is concerned, I do not think the admissibility has been established.

I do not pretend to say that it could not be reasonably established; I merely say that on the proof submitted the ordinary shopbook rule has not been met, so far as its requirements are concerned, and I see nothing in the statute cited that should cause the Court to set aside the application of the ordinary shopbook rules of this situation. The objection is sustained.

I will say this for the consolation of counsel, if it is any, that in this case the Court has the assistance of the work of leading lawyers of the Seattle

(Testimony of R. P. Jandl.)

bar on both sides of the case, and in this instance it is no different from the usual instance of trial of cases generally, no matter how experienced the lawyers may be it seems seldom that lawyers are really thoroughly prepared or are able to meet adequately the ordinary shopbook rule which has been in existence since all of the time that we have had courts in this country. You may proceed.

Mr. Matthews: If the Court please, would your Honor [105] consider the admissibility of the record for proving the names of the passengers? This witness has testified that they are the same.

The Court: It depends on whether there is objection or not. Of course, if there is agreement between counsel about whether a document may be admitted, the Court is not concerned with admissibility then.

Mr. Cluck: As far as names are concerned, I think it has been made clear there will be no disagreement on that. We are glad to accommodate you and eliminate the necessity of going to such lengths of proving that particular matter.

The Court: There will be no admission in the absence of stipulation or withdrawal of objections. You may proceed.

Q. (By Mr. Matthews): Will you look at Exhibit A-7 which I have handed to you?

A. Yes.

Q. I will ask you if that is your signature?

A. Yes.

Q. Are you familiar with the signature of Mr. Houghton? A. Yes.

(Testimony of R. P. Jandl.)

Q. Does that stipulation cover the settlement that was made of all of the claims of the passengers that were on the attempted take-off of the eastbound flight? [106]

A. Yes.

Mr. Matthews: I will offer Defendant's Exhibit A-7 in evidence.

Mr. Cluck: We object, Your Honor. The only possible purpose of its being offered is to show the identity of the passengers, and we have just indicated to counsel that we are glad to accommodate him on that issue, and the witness, as a matter of fact, has already responded to those questions.

The Court: I do not recall that this record shows any statement by anybody as to who the passengers were on either of these flights.

Mr. Cluck: Your Honor, what this is, as explained by opposing counsel, is a settlement covering personal injuries in the crash. It has nothing to do with this lawsuit. The witness has been asked certain questions concerning the names of passengers on the west and eastbound flights as far as he knew them, and he said in substance, as I recall his testimony, that they were the same persons as far as he knew with the exception of one passenger.

We have also indicated that if during the noon hour there is any question in regard to identity of persons, as long as a stipulation is worded correctly and properly, we are glad to accommodate counsel on that, and it seems [107] to us that this matter of offering this particular stipulation has nothing

(Testimony of R. P. Jandl.)

whatever to do with the case and only encumbers the record and presents, if anything, confusion.

The Court: What have you to say, Mr. Cluck, on the identity of the parties mentioned in the agreement, Defendant's Exhibit A-7, and the passengers on these two flights?

Mr. Cluck: As I understand it, the stipulation covers all of the passengers that were in the plane at the time of its attempted take-off, and with one exception the same individuals as came west on one of the other flights.

The Court: Do you object to the admission of A-7 on the ground that that instrument is not anything that was made between the parties to the litigation now before the Court?

Mr. Cluck: It involved these parties, but it also involved other counsel, your Honor, and the point we make is that it is submitted for an entirely irrelevant purpose. If the purpose is to identify students on this aircraft, we have indicated that we are willing to have that point covered and we submit that the witness has already testified to it.

The Court: If the agreement which is Defendant's Exhibit A-7 was between the litigants in this action, in [108] my opinion it is admissible if it concerned any material issue. Do you deny that the agreement marked for identification Defendant's Exhibit A-7 was between the parties to this litigation?

Mr. Cluck: As I recall it, your Honor, that was a stipulation Mr. Houghton worked out relating to

(Testimony of R. P. Jandl.)

settlement of personal injuries as between the insurers and the different individuals who were on the aircraft, the administrator being concerned only in an incidental way to it, so that there are different parties involved; and moreover, we submit that the stipulation has no real bearing on the matter of identifying passengers, if that is the purpose of counsel, and that that particular point can be covered very simply and easily without any occasion for resorting to something so unrelated to that issue..

Mr. Houghton: I might say that the administrator was only a party incidentally, simply that the settlement made between the students and the insurance company should not prejudice or affect the rights under this hull coverage. The Government, which is a party to this action, and the second mortgagee, who are parties to this action, Breakiron, had nothing whatever to do with that stipulation. We are willing to have Mr. Matthews read the names of those students from the stipulation [109] into the record, the names that appear on there, and we will say that they were students on this flight at the time the plane wrecked, and that takes care of his purpose in putting it in.

The Court: Does that offer an acceptable substitute, **Mr. Matthews?**

Mr. Matthews: I think the stipulation is admissible.

The Court: I do not think so as against Breakiron. Breakiron was not a party to the stipulation.

Mr. Houghton: The Government was not a party.

(Testimony of R. P. Jandl.)

The Court: Was the Government a party to it?

Mr. Houghton: No, sir.

Mr. Matthews: It is admissible as against Jandl.

The Court: The administrator?

Mr. Matthews: Yes.

Mr. Cluck: For what purpose?

Mr. Matthews: To prove who was on the plane.

Mr. Houghton: Your Honor, we have agreed to let him state in open court who was on the plane and we will agree to it.

The Court: That agreement does not dispose of his right to have the document received in evidence as against the person against whom it is admissible.

Mr. Houghton: There is nothing in it that is detrimental to Jandl. [110]

The Court: The Court is of the opinion that so far as the administrator Jandl is concerned, the document is admissible in this case against him, but in view of the objection of other plaintiffs in this action, I will postpone ruling upon whether or not it is to be admitted in the case until I see what the final arrangements may be between counsel as to its admission as against all or only part, and you can make that final arrangement during the noon hour. Those connected with this case are excused until 1:30, and the Court is recessed until that time.

(At 12:02 o'clock p.m., Wednesday, October 11, 1950, proceedings recessed until 1:30 o'clock p.m., Wednesday, October 11, 1950.)

(Testimony of R. P. Jandl.)

Seattle, Washington—October 11, 1950, 1:30 P.M.

The Court: The witness who was on the stand will resume the stand for further interrogation.

Q. (By Mr. Matthews): Referring again to the westbound manifest, do you know what distribution—do you know how many copies of that manifest are made out? A. No, I don't.

Mr. Cluck: We object to any questions concerning [111] the westbound manifest as something not being in evidence.

The Court: As to this question, the objection is overruled. You may answer that.

A. No, I don't know how many copies are made.

Q. You are familiar with the fact that that is a record that is required to be made out by the rules of the Civil Aeronautics Authority? A. Yes.

Q. On each flight?

The Court: Do you expect the witness to answer the last clause of the question? Read the question.

(Last question read by reporter.)

A. Yes.

Q. Is this westbound manifest, Defendant's Exhibit A-6, the only westbound manifest that you have been able to locate?

Mr. Cluck: I object to the form of the question as implying that the paper designated westbound manifest has any status at all, because the witness is shown not to have been qualified to testify to it.

The Court: The objection is overruled. This, as

(Testimony of R. P. Jandl.)

I understand, is interrogation of the witness called as an adverse witness.

Q. Would the reporter read the question, please?

(Last question read by reporter.)

The Court: I do not think your question is definite [112] enough. Do you mean, for instance, your office or my office or where, if anywhere?

Mr. Matthews: I will rephrase the question.

Q. You have previously testified that Defendant's Exhibit A-6, the westbound manifest, was turned over to you by Mr. Keith? A. Yes.

Q. The eastern representative of Mr. Leland?

A. Yes.

Q. Who arranged this flight? Did he turn over to you any other westbound manifest besides this one?

A. No, that is the only one he turned over.

Q. Did you find in the records and files in Mr. Leland's office any other westbound manifest besides this one?

A. I don't recall any others at this time, no, but everything was gone through by everybody. That makes it rather difficult to answer that question directly.

Q. You spoke about the CAA or CAB taking some records from the office? A. Yes.

Q. Were not all those records returned to you?

A. I do not believe so, but I don't know, because I never had a receipt for them in the first place. I turned over the files to them and says, "Here it is. Take what you want." [113]

(Testimony of R. P. Jandl.)

Q. Did you ever get a letter from the CAB releasing all the records to you?

A. I got a letter, but I never got any records back. All I got was a few manifests.

Q. Do you remember what the letter said?

A. No.

Q. Do you have a copy of the letter?

A. No.

Q. What did you do with it?

A. I don't know. It might be in the stack of files I have at home, I do not know.

Q. In the stack of files you have at home?

A. Yes.

Q. You stated in answer to a request for admission that a number of records had been turned over to the CAB and you have not been able to get them back. Am I correct in so understanding your testimony?

A. I believe I forgot what the admission said, but I think that is what it was, yes.

Q. Isn't it a fact that none of the originals were introduced in evidence in the CAB hearing but photostatic copies were made and that all of the originals were returned to you?

A. I don't know. If they were, I can't find them now.

Q. Didn't Mr. Cuddeback write you a letter releasing [114] to you all of the original records that had been taken from you by the CAB?

A. I don't know. I would like to see the letter if he did.

(Testimony of R. P. Jandl.)

Q. You don't remember any such letter?

A. I don't remember the letter, no.

Q. You don't remember him returning any documents to you, or releasing any documents to you?

A. I remember his giving me a file of manifests of 79025 which I had. I could find that bunch of documents, but nothing relating to this flight.

Q. Did you make any effort to get the records back after he told you you could have them back?

A. I don't recall.

Q. You stated in your answer to our request for admissions that the originals were in Washington, D. C.

Mr. Houghton: I don't think he said that.

Q. Maybe I am mistaken. On page four of the answer to request for admissions, which is over your sworn statement, you state: "On January 3 and 4, 1949, the plaintiff Administrator delivered to a representative of the Civil Aeronautics Administration all available records pertaining to Aircraft NC79025 for the period 1947 and 1948, including all logs, log books and maintenance and operations records that could be found. These were not examined by any of the plaintiffs [115] and none of the plaintiffs have any personal knowledge regarding their contents. They were never returned." Is that a true statement?

A. Yes, I don't know what happened to them. Somebody must have grabbed them and it must have been the CAA, because they were asking for them.

Q. You go on to say: "After plaintiffs were

(Testimony of R. P. Jandl.)

served with defendants' request for admission under Rule 36 they inquired of the Seattle representatives of the Civil Aeronautics Administration and learned that, as far as can be determined from local sources, all of these documents were sent to Washington, D. C., and deposited there in the record section of the Civil Aeronautics Administration." Who made that statement to you?

A. Mr. Cuddeback, I believe.

Mr. Houghton: I object to the form of that question. The answer does not say anybody made that statement to him. It is an answer on behalf of all of these plaintiffs and the statement to their counsel would be sufficient on that. He doesn't claim in this paper anybody made that statement to him.

Mr. Matthews: I thought he just testified Mr. Cuddeback did make that statement.

Mr. Houghton: Maybe he did, but he doesn't say in this paper anybody made the statement to [116] him.

The Court: The objection is sustained. Make it clear in your question you are relating to what he said about Mr. Cuddeback rather than what he said in the paper by way of answer to requests for admission.

Q. It is your testimony that you had a conversation with Mr. Cuddeback to try and locate these records that I asked you to produce?

A. Yes.

Q. What do you claim he told you?

A. He told me he didn't have them. He went through his files; he didn't have them.

(Testimony of R. P. Jandl.)

Q. Did he make any statement to you that they were in Washington, D. C.?

A. Not to my knowledge, no. I don't recall.

Q. You verified under oath the answer to these requests for admissions in which it is stated that as far as can be determined from local sources all of these documents were sent to Washington, D. C., is that right?

A. If it is in there, it must be.

Q. Did you read this answer to our requests for admission before you signed it?

A. I read it, yes, but I don't recall—you are asking me to recite something that I signed four or five weeks ago, and it is making it rather difficult.

Q. Would you like to see the original before you answer [117] the question?

A. I would like to see what I admitted before I say yes.

The Court: Does anybody at counsel table have a copy you could lend the witness?

Q. Will you look at page 4, starting at line 11, and will you read the sentence that starts in the middle of that line, "After plaintiffs were served with defendants' request."

A. "After plaintiffs were served with defendants' request for admission under Rule 36 they inquired of the Seattle representatives of the Civil Aeronautics Administration and learned that, as far as can be determined from local sources, all of these documents were sent to Washington, D. C.,

(Testimony of R. P. Jandl.)

and deposited there in the record section of the Civil Aeronautics Administration.”

The Court: Was your request to have this witness read that answer into the record of the case? It has already been previously read into the record. Make your meaning specific. I think what you meant was to ask him to read that over to himself silently so that he would be prepared to answer your further interrogation. What you have instead is another repetition of that same long statement in the record, which in the case of appeal whoever appeals will have the opportunity of paying for, and there is no need of it. [118]

Mr. Matthews: I intended just to have him refresh his recollection.

The Court: Do you wish to ask him a question based upon that information with which his mind may now be refreshed?

Mr. Matthews: Yes.

Q. (By Mr. Matthews): Did you sign and swear to under oath the answer to defendants' request which contains the statement that you have just read? A. Yes.

Q. Did anyone tell you that the originals are in Washington, D. C.?

Mr. Houghton: Just a minute. He doesn't say anybody told him. This is an answer he verifies on behalf of all of the plaintiffs, prepared by his counsel, and if his counsel made that inquiry and told him that is what they said, I think he had a right to verify it. Someone must verify it. These

(Testimony of R. P. Jandl.)

things couldn't all be within his own personal knowledge.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

A. Not directly. It is through Mr. Houghton, the counsel.

Q. In response to our request, did you make any effort yourself to find these documents that I asked you to produce [119] or did you just leave it up to Mr. Houghton?

A. I left it up to Mr. Houghton.

Mr. Houghton: Just a minute. I am wondering if he is still talking about the same thing. He was just talking about this long document here, the preparation of which was left up to his counsel. I just wanted to find out if he understands what counsel is talking about now, apparently not this document, but documents that he was subpoenaed to bring into court.

The Court: The Court sustains the statement as and for an objection and asks interrogating counsel to clarify his question.

Q. I am referring to the statement contained in your answer to our request for admission to the effect that: "On January 3 and 4, 1949, the plaintiff Administrator"—who would be you—"delivered to a representatives of the Civil Aeronautics Administration all available records pertaining to Aircraft NC79025 for the period 1947 and 1948, including

(Testimony of R. P. Jandl.)

all logs, log books and maintenance and operations records that could be found." Is it your statement that none of these records I have just referred to were returned to you?

A. The statement is stated in here, yes, but since then, since you subpoenaed these documents, I was going through three or four times and in the process of going through the [120] files I found a couple of files of manifests on 79025 which I believe were returned to me by Mr. Cuddeback.

Q. Where did you find those records?

A. In the file of correspondence and other things that I have in my home.

Q. You didn't bring that file with you?

A. I believe I did.

Q. Do you have it here now?

A. Yes, it is here somewhere.

Q. Would you object if I examined it?

A. No objection with me, no.

The Court: You may step down, Mr. Witness, and deliver the file to counsel who asked for it. Is there any part of it you wish to call to the attention of your counsel?

Mr. Houghton: We would like to find out what it is that is wanted.

The Court: You may discuss it together for a moment.

Q. (By Mr. Matthews): Have you any other records besides these two bundles you have given me?

The Court: The witness will resume the stand.

(Testimony of R. P. Jandl.)

The direction of the Court that he hand to interrogating counsel the documents mentioned in the recent question and answer has been accomplished. You may now proceed.

Mr. Matthews: May I have this marked for identification? [121]

The Court: The witness a few moments ago in an aside statement referred to what is now being handed to the clerk for placing thereon identifying marks as the charred remains of the what?

The Witness: Of the operations manual.

(Charred records marked Defendant's Exhibit A-8 for identification.)

The Witness: Here is a couple of charred ones that were part of the requested stuff to be subpoenaed.

Mr. Cluck: If your Honor please, I hesitate even to handle this material here. Perhaps the witness could tell us what it is if we had a short recess.

The Court: Let him do it now. The Court hoped some of these matters could be disposed of during the noon hour, and they have not been. We will have to proceed. Let these papers mentioned by the witness in his last statement be added and now deposited with Defendant's Exhibit A-8. Will the witness step down and take in his hands the papers he last referred to and which the Court last referred to and attend to the passing from his hand of that group of papers to the group of papers re-

(Testimony of R. P. Jandl.)

ferred to marked Exhibit A-8? When that is done, I wish the witness to resume the stand. Mr. Witness, have you done what the Court requested you to do?

The Witness: I didn't get your question. [122]

The Court: Take in your hands the papers you had in your hands when you were on the witness stand a few moments ago when you made the offer to make them part of Defendant's Exhibit A-8. Are those the papers?

The Witness: Yes.

The Court: Will you deposit those papers into the group of papers which previously have been marked Defendant's Exhibit A-8? Have you done that?

The Witness: Yes.

The Court: You may resume the stand. Proceed with the interrogation. They are all now a part of Defendant's Exhibit A-8 for identification. Do not take any part of Exhibit A-8 apart. It is in the clerk's care.

(Folder of manifests marked Defendant's Exhibit A-9 for identification.)

(Folder of manifests marked Defendant's Exhibit A-10 for identification.)

Q. (By Mr. Matthews): Referring to Exhibit A-8, which is the bundle of papers that are burned on the edges, were they taken from this airplane?

A. Mr. Cuddeback gave them to me. I never took them, no. As far as I know, they were.

(Testimony of R. P. Jandl.)

The Court: Where, if you know, have they been kept since Mr. Cuddeback gave them to you?

The Witness: They were put in the transfer cases [123] and I took them all to my home, in the basement.

The Court: Have they been in your custody ever since?

The Witness: Yes.

The Court: Have you kept them in your custody as files and business records of the Leland partnership, or of Mr. Leland?

The Witness: Yes.

Q. (By Mr. Matthews): Handing you what has been marked as Exhibit A-9, state what that folder contains generally.

A. It contains miscellaneous data, manifests.

Q. If I counted correctly, there are about 23 manifests in that folder? A. Yes.

Q. Are those manifests that are in that folder manifests that were kept by Mr. Leland in the regular course of his business?

Mr. Houghton: If you know.

A. I don't know.

Q. Is that folder a part of the records of Mr. Leland which came into your possession as administrator of the estate? A. Yes.

Q. During the years that you represented Mr. Leland, did you have access to those records?

A. I had access to them, yes.

Q. Did you take them from his office after you were [124] appointed administrator?

A. Mr. Cuddeback returned these to me and I

(Testimony of R. P. Jandl.)

put them in the file and took them from the office and put them in my home.

Q. Did you originally deliver them to Mr. Cuddeback?

A. I don't recall. In fact, I am quite sure I did not.

The Court: The only way that these questions can be made and the answers can be made helpful on the question of whether any document is admissible is in connection with establishing what the fact is with reference to whether these were the business records of Mr. Leland and whether they were made by some employee of Mr. Leland with relation to the performance by him of some necessary business or occupational duty and whether or not they were made by any such employee in the ordinary business course of such employment and what use of them since they were made has been made, whether they were used by the business in the ordinary course of the business, whether they were kept for that purpose, whether they have been preserved as and for business records for any and all needed business uses—those are some of the questions which may properly pertain to counsel's efforts to authenticate them for admissibility, and in respect to several instances such evidence is in the main lacking. Proceed.

Q. (By Mr. Matthews): It was the practice of Mr. Leland [125] to keep a manifest covering each flight, was it not? A. Yes.

Q. And those manifests were kept in the office?

(Testimony of R. P. Jandl.)

A. They were kept in the office, yes.

Q. And those manifests which you have in your hand are part of those manifests which were kept by Mr. Leland in the ordinary course of his business?

Mr. Houghton: Should that be accompanied by "if he knows"?

The Court: This, as I say, is in the nature of cross-examination because this witness was called as an adverse witness. It is often difficult to keep that situation in mind.

The Witness: State the question again, please.

(Last question read by reporter.)

The Witness: I don't know.

Mr. Houghton: Might I suggest this, your Honor, Mr. Jandl is an officer of the court. You don't make a man an adverse witness simply by calling him an adverse witness. He is an administrator serving under order of the Superior Court of King County, and I think his examination is subject to the same rules as any other witness, and that they are not entitled to call him as an adverse witness.

The Court: The rules applying to calling of adverse [126] witnesses in this court apply to an adverse party. I believe that the records and files in this case show Mr. Jandl is an adverse party, adverse to those litigants represented by Mr. Matthews, the attorney now examining.

I am not aware of any exception in the rule relating to the right to call an adversary party as

(Testimony of R. P. Jandl.)

an adverse witness because of the fact that the person called to the witness stand happens to be acting in a representative capacity by appointment of some court. Unless you have some judicial authority binding on this Court to the contrary, the Court will have to rule against the contention stated by Mr. Houghton in his last statement.

Q. (By Mr. Matthews): Mr. Jandl, you have previously stated you knew that the requirements of the Civil Aeronautics Administration required the making out of a manifest covering each flight, is that right? A. Yes.

Q. So far as you know, are these the manifests that were made out and kept in the office pursuant to that statutory requirement?

A. As far as I know, yes.

Q. Does the same thing apply to Defendant's Exhibit A-6, the westbound manifest?

The Court: Show him A-6.

Q. That covered the westbound flight of these Yale boys, [127] the one turned over to you by Mr. Keith?

Mr. Cluck: I object to that question, your Honor, because it has been covered. He said it was handed to him by Mr. Keith and that is all he knew about it.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

The Witness: As far as I know, yes.

Q. Is it customary to make out those manifests

(Testimony of R. P. Jandl.)

at the time of the flight or within a reasonable time thereafter? A. Yes, as far as I know.

Q. This Defendant's Exhibit A-6, after it was turned over to you by Mr. Keith, you placed it as a part of the business records of Mr. Leland in his files? A. Yes.

The Court: What was your relationship to Mr. Leland's business at the time Mr. Keith delivered to you Defendant's Exhibit A-6?

The Witness: Administrator.

Q. I notice that none of the manifests that are in the file which has been identified as Defendant's Exhibit A-9 are signed by anyone, is that correct?

A. Apparently not.

Q. Is the form that is used for all those other exhibits that are found in A-9 the same as the form, the printed form, [128] that was used on Exhibit A-6, which covered the westbound flight of the Yale boys? A. Yes.

Q. Calling your attention to Defendant's Exhibit A-10, do you find a number of manifests in that folder? A. Yes.

Q. Are they the same type of manifest as Defendant's Exhibit A-6? A. Yes.

Q. Kept in the same way on the same form?

A. Yes.

Q. Without any signature?

A. You are speaking of manifests?

Q. Yes. A. Yes.

Q. They were also part of the business records

(Testimony of R. P. Jandl.)

which were turned over to you as administrator of the estate? A. Yes.

Q. And you have since kept them as such?

A. Yes.

Q. Is there any difference in the form in which Exhibit A-6, which is the westbound manifest covering the flight of the Yale boys, is kept and the manner in which all these other manifests were kept as appears from those records?

A. Is there any difference? [129]

Q. Yes. Except as to names and weights and so forth, are they both kept in the same way?

A. It appears so, yes.

Mr. Matthews: That is all. I would like to offer at this time, re-offer Defendant's Exhibit A-6 in conformity with Sec. 1732 of Title 28, which I believe I covered. I have tried to follow the statute, and I believe the witness has stated in answer to my questions answers which make that admissible. Would the Court care to hear that statute?

The Court: Is there any objection to the offer?

Mr. Cluck: We renew our objection, your Honor, and we have likewise referred during the noon hour to Sec. 1732 and believe that statute applicable.

The Court: The Court believes that this Exhibit A-6 has been properly authenticated by the proof already adduced, and the objections to its admission are overruled and Defendant's Exhibit A-6 is now admitted.

(Defendant's Exhibit A-6 received in evidence.)

TO: Mid-Expor to Minnie CAPTAIN Hoyt 1ST OFFICER Ray
 FROM: Minnie TO Sea CAPTAIN Renall 1ST OFFICER Tomas
 TYPE: DOUG MAKE, MODEL: G-3 PT. DEPT. Idgeport ROUTE: G-3, G-2 PT. DEST. Sea
 STOPS ENROUTE: Chil, Minn, Bil E.T.A. DEST. 1700 HRS. FUEL ABOARD 4

PASSENGER	ADDRESS	PERM. T.L.	BAG. T.L.	DEST. T.L.	FARE	TKT. NO.	U ⁿ
1 Reese, O.G.	7709 23rd Seattle	160	35	Sea	THIS MANIFEST WILL BE USED IN PLACE OF TICKETS		
2 Wickman, L.B.	Bellvue, Wash.	155	30	"	SPECIAL STUDENT CHARTER		
3 Anderson, T.	1435 Pk Lane, Spc	150	40	"	SPECIAL STUDENT CHARTER		
4 Brown, M.	1216 24th N. Sea	145	25	"			
5 Smith, J.	1834 98th St. 1835 98th St.	165	35	"			
6 Schack, J.	120 Lynn St. Sea	160	40	"			
7 Lynch, J.	2916 Deacon Ave Seal	140	35	"			
8 Thompson, T.	Cedar Falls Wn.	155	30	"			
9 Knoll, J.	1918 86th Blvd	135	25	"			
10 Wilson, O.	4511 Emerson, Seal	150	30	"			
11 Roderick, J.	1230 15 N. Sea.	185	35	"			
12 Franzheim, H.	Seattle Wash Blvd	170	20	"			
13 Carrett, D.L.	Portland Ore 4111 1st Alameda	155	40	"			
14 Laird, R.	Comas, Wash.	155	40	"			
15 Bryan, J.	6309 2nd, Portland	145	30	"			
16 Biddle, J.	1835 98th St. 1836 98th St.	175	35	"			
17 Bjork, R.	Astoria, Wash 855 Florence	150	40	"			
18 Engle, C.	1141 37th N. Sea	160	35	"			
19 Haerle, D.B.	Portland Oregon 2038 Greenwood Rd	165	35	"			
20 Cole, G.	6516 17th NW, Sea	155	30	"			
21 Young, R.	3836 45th S., Sea	160	40	"			
22 Hartley, M.	Seattle Box 127 Mercer I.	155	35	"			
23 Campbell, D.	R #1 Solah, Wn.	135	40	"			
24 Palmer, R.H.	R 13 Vancouver Wn	150	30	"			
25 Bellman, C.	Portland Ore 2515 Hawthorn	145	40	"			
27 Howe, W.	178 Kane Wash 1124 Bernard St.	165	40	"			
28 Adams, R.	9829 Yallis, Ore 3857 Jackson St.	160	25	"			

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MANIFEST 2401
 OF TRAVEL EXHIBIT 8-2
 ADMITTED OCT 11 1950



(Testimony of R. P. Jandl.)

The Court: Did your statement include an offer of A-7, A-8, A-9 and A-10? I think you should offer each one separately so that counsel and the Court could deal with each one.

Mr. Matthews: We will offer Defendant's Exhibit A-8. [130]

The Court: That is the charred remains of the operations manual.

Mr. Cluck: We object, your Honor, on the same grounds as those previously indicated.

The Court: The objection is overruled. Defendant's Exhibit A-8 is now admitted.

(Defendant's Exhibit A-8 received in evidence.)

Mr. Matthews: We offer Defendant's Exhibit A-9.

Mr. Cluck: That is the file?

Mr. Matthews: The file of manifests, similar to Exhibit A-6.

Mr. Cluck: We make our objection to that on the additional ground that that file contained a number of papers, many of which relate to transactions not even claimed by defendants to be bearing on the one at hand, except as they may illustrate some similarity on the markings on the papers in the file.

The Court: Do you wish to clarify the purpose for which you offer these by an additional statement?

Mr. Matthews: The only purpose of offering it is to show the manifest A-6 is kept in exactly the

(Testimony of R. P. Jandl.)

same manner and form as all of the other manifests that appear in Exhibit A-9, as a regular business record.

The Court: The objection to A-9 is overruled and [131] that exhibit is now admitted.

(Defendant's Exhibit A-9 received in evidence.)

Mr. Matthews: We offer in evidence Defendant's Exhibit A-10 for the same reason, same purpose.

The Court: Is it the same kind of material——

Mr. Matthews: Yes, your Honor.

The Court: ——as that in A-9? Do you make the same objection to A-10, Mr. Cluck?

Mr. Cluck: Yes, and further that the file contains papers even designated in other business, Arnold Air Service, which do not have any bearing at all, even in form or similarity of form, to the present.

The Court: Insofar as it relates to other business other than Mr. Leland's business, those parts of it are excluded and not admitted and the Court will give no consideration to any such papers which may now be physically in the file, but in respect to all parts of it which relate to the business of W. F. Leland, deceased, the objection is overruled and Defendant's Exhibit A-10 is now admitted.

(Defendant's Exhibit A-10 received in evidence.)

(Testimony of R. P. Jandl.)

Mr. Matthews: No further questions of this witness.

The Court: He being called as an adverse witness, [132] the plaintiff may ask certain questions pertaining to the questions asked on direct. Plaintiffs' counsel are reminded that they have the right to call this witness as their own witness on these or any other matters without any limitation of scope of inquiry of the witness.

Cross-Examination

By Mr. Cluck:

Q. Who was this Mr. Keith that you mentioned that handed over the manifest to you?

A. He was Mr. Leland's eastern representative.

Q. Where did he live?

A. He was living in New York, in the vicinity.

Q. When you say eastern representative, what do you mean by that?

A. He was handling Mr. Leland's affairs in the East, endeavoring to obtain business.

Q. What were his duties?

A. Principally sales and obtaining loads for the plane.

Q. Obtaining business for the company, is that it?

A. That is right.

Q. Did he have anything to do with the operations of the aircraft in respect of loading passengers or freight?

A. He would be present at the field at the time it was done, at the time the plane was loaded.

(Testimony of R. P. Jandl.)

Q. Do you know who in the East took the weights of [133] passengers or cargo as it was put on the planes? A. No, I don't.

Q. Do you know whether Keith did that?

A. No.

Q. He did not, or do you know?

A. I don't know.

Q. Do you know anything at all otherwise about the matter of entering weights on the manifests so far as East Coast operations are concerned?

A. No, I don't know anything because I wasn't there.

Q. When you received that paper, you were administrator of Leland's estate, is that correct?

A. Yes.

Q. What did you do with it when you got it?

A. Placed it in the files.

Q. Placed it in the files along with his other effects, is that it? A. That is right.

Q. Do you know anything more about the paper at all?

A. Not other than what is on the paper itself.

Q. Do you know who was in charge of Mr. Leland's actual flight operations in the East?

A. No.

Q. Did he have someone charged with that responsibility? A. Usually it was—— [134]

Mr. Matthews: I object to what it was usually, unless it refers to this specific flight.

The Witness: The answer is no, then.

(Testimony of R. P. Jandl.)

Q. By whom was the operation handled as far as disposition of passengers, and so forth, is concerned, do you know that?

A. The pilots generally took care of that, assisted by Mr. Keith if he was there.

Q. What did the pilot do generally?

Mr. Matthews: On this particular flight?

Mr. Cluck: I am asking the business practice in regard to the loading of the ship.

The Witness: The pilot would make up the manifest and his weight and balance.

Q. Do you know what the terms of employment of Mr. Keith were? Do you know of any paper where his duties are set forth or any source of information from which the extent of his duties may be gained?

A. Not right now, no. Not without looking.

Q. With regard to these other papers, let's refer first to the operations manual. You said that was handed to you by Mr. Cuddeback, is that right?

A. Yes.

Q. Did you have anything further to do with it?

A. No.

Q. Was that the first time you had had occasion to see [135] it, or had you seen——

A. That is the first time I saw it.

Q. How did it happen Mr. Cuddeback handed it to you?

A. He said this goes along with these other papers that he returned in connection with returning the records.

(Testimony of R. P. Jandl.)

Q. Did you at any time in the course of your dealings with Mr. Leland have duties other than those of an accounting or advisory nature that you mentioned this morning? A. No.

Q. You had nothing to do with operations?

A. No.

Q. Did you have a personal knowledge of any of the papers that have been offered here as exhibits, personal knowledge of their contents?

A. You mean did I look at them before I brought them up here?

Q. No. Did you have any personal knowledge as to the manner of preparation, for example; do you know who prepared them? A. No, I don't.

Q. Do you have occasion in the course of any of your connections with the business to check on the correctness of the entries in any of them?

A. Only insofar as collections were concerned, to determine that each fare was—— [136]

Q. What records did you deal with on that?

A. Duplicate copies of the tickets.

Q. What kind of tickets?

A. In the case of common carriage, you sell one ticket to each passenger and you have to account for that in the manifest, be sure that that passenger went and the fare was collected for him.

Q. In connection with your accounting work, what books, records, would come ordinarily within the scope of your duties to handle, that Mr. Leland had?

(Testimony of R. P. Jandl.)

A. Generally any copy of a manifest pertaining to common carriage loads, exclusive of charters, and tickets pertaining to that manifest. That is about all that I would handle, other than invoices and checks and stuff like that.

Mr. Cluck: That is all.

Mr. Matthews: That is all.

Mr. Cluck: Just one question, if the Court please. Had Leland's business been discontinued or had it not when you received what was identified as Exhibit A-6?

The Witness: It was discontinued.

Mr. Cluck: At what date was it discontinued?

The Witness: Immediately after I became the administrator.

Mr. Cluck: That is all.

The Court: May I suggest that in this case more than [137] others I notice that there have more often arisen occasions when the counsel taking the laboring oar found it needful to leave the room. I would like to say in protection of such counsel, as well as the proper proceedings in the case, that I think counsel should not leave the room without having some definite arrangement made, because something might happen while counsel is absent from the room, and if it was not brought to his attention and there came up any point involving what occurred later on, he might be either at a disadvantage or some action might be taken by the Court to his prejudice, so I ask that counsel in the case, and

particularly those taking the laboring oar, try to avoid the necessity of leaving the room except at the recess periods unless you get permission. If you feel the occasion is likely to arise often and the importance of it is great, if you care to make an arrangement now on the plaintiffs' side, if either Mr. Dennis or Mr. Houghton or Mr. Cluck is present, the Court may proceed without any concern as to the absence of any one of the other of those gentlemen, and on defendants' side, if you care to arrange that so long as any one of counsel now present is here the Court may proceed with the understanding the Court is authorized to proceed in the absence of any one of the others. [138]

Mr. Matthews: That is agreeable with defendants.

Mr. Dennis: In my absence, either Mr. Houghton or either one of the counsel can act for the Government.

Mr. Cluck: That is agreeable as far as counsel for plaintiffs are concerned.

The Court: Is the Court's statement agreeable so far as each of the three of counsel appearing for plaintiff is concerned?

Mr. Houghton: Yes, it is.

The Court: Is the Court's statement agreeable to defendants as far as each of the three counsel are concerned?

Mr. Matthews: Yes, your Honor.

The Court: On the defendants' side, if either

Mr. Wilkerson, Mr. Matthews or Mr. Sax is present, the Court may proceed.

Mr. Matthews: Yes.

LEON D. CUDDEBACK

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name? [139]

A. Leon D. Cuddeback.

Q. What is your occupation?

A. I am chief of the region for the Bureau of Safety Investigation of the Civil Aeronautics Board.

Q. Stationed here in Seattle? A. Yes, sir.

Q. What connection did you have, if any, with the investigation of the crash of a certain Douglas DC-3 airplane No. NC 79025 which crashed at Boeing Field, on January 2, 1949?

A. The Civil Aeronautics Board is charged by law with the investigation of aircraft accidents, civil aircraft accidents of airplanes of American registry, and as chief of the region in this area I am charged with that responsibility by the Board.

Q. Did you so act in connection with the investigation of this accident?

Mr. Cluck: We object to this and any further

(Testimony of Leon D. Cuddeback.)

questions upon the grounds previously indicated. What this witness has done with respect to any CAA investigation is not a part of this particular proceeding.

Mr. Matthews: Our position, your Honor, is that the statute does not prohibit the witness as an individual from testifying as to what he did, but it only applies to the findings and the report of the CAB.

The Court: It would be very helpful to the [140] Court in ruling on this objection if counsel on either side had any authority they could point to. I am going to have to apply the statute unless counsel show me some sort of authority that clarifies it. I am going to have to apply the statute to this the same as the other.

Mr. Matthews: Your Honor, as we read the statute, and we may be wrong, the statute only applies to the report of the Board and does not prohibit——

The Court: Will you read the statute, please? It would be very useful if you had investigated the court decisions on this point to see if there are any. Someone might ask the witness either formally or informally if by chance he is a lawyer, if he knows of any authorities on the point.

Mr. Wilkerson: I might say to the Court that I did make a search for authorities and found none either way, except I believe that the plain wording of the statute itself excludes only the report and the findings.

(Testimony of Leon D. Cuddeback.)

The Court: It is difficult for me to appreciate how he could make a finding that would be disconnected from his official capacity.

Mr. Wilkerson: Mr. Cluck has handed me a portion of the statute which reads: “. . . no part of any report or reports of the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be [141] admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.”

Obviously, if you ask the witness what he knows within his own knowledge, that is not a part of the report or reports of the Civil Aeronautics Board relating to an accident.

The Court: Does the report have to be made orally or in writing to be covered by the provisions of the statute?

Mr. Wilkerson: Another section of the statute requires the Board to make the report in writing concerning the accident.

The Court: You think that is the report mentioned in the statute?

Mr. Wilkerson: I think it is, your Honor.

Mr. Houghton: Your Honor, might I say this: what we have here is just an extract of the statute, with stars, and it was prepared—something that was typed off in connection with the King County case, where the only thing at issue was the formal report, so I don't think this is all the statute.

The Court: What is the statute citation?

(Testimony of Leon D. Cuddeback.)

Mr. Houghton: 49 U.S.C.A., Sec. 581, and I think this is just a small part of it. [142]

The Court: Would you be willing to be excused and go with the bailiff to the Judge's chambers and see if you can get that statute? I do not have it on my desk.

Mr. Cluck: We just sent the bailiff after it, your Honor.

The Court: I would suggest that at the next recess counsel arm themselves with the books which contain all statutes which are involved, all statutes or administrative regulations, which you claim are involved in this proceeding so that you can have them on counsel table for use in any occasion similar to this.

Proceed. The Court will reserve ruling. Take up something else.

Mr. Wilkerson: I believe we will have to call another witness, Your Honor.

The Court: Step down. Call another witness.

Mr. Houghton: Your Honor, may Mr. Jandl be excused for the rest of the afternoon? He is the plaintiff, of course, one of the plaintiffs.

The Court: I doubt that he should be. Things will probably take place that he should be here. I deny that request.

Mr. Matthews: Call Mr. Miner. [143]

No. 13122

**United States
Court of Appeals**
for the Ninth Circuit.

UNITED STATES OF AMERICA, R. P. JANDL,
as Administrator of the Estate of William F.
Leland, Deceased, and C. W. BREAKIRON,
Successor Receiver for Atlantic and Pacific
Airlines,

Appellants.

vs.

EAGLE STAR INSURANCE COMPANY,
LIMITED; ORION INSURANCE COM-
PANY, LIMITED; THE DRAKE INSUR-
ANCE COMPANY, LIMITED, Subscribing
Underwriting Members of Lloyd's, London,

Appellees.

Transcript of Record

In Two Volumes

Volume II

(Pages 271 to 544)

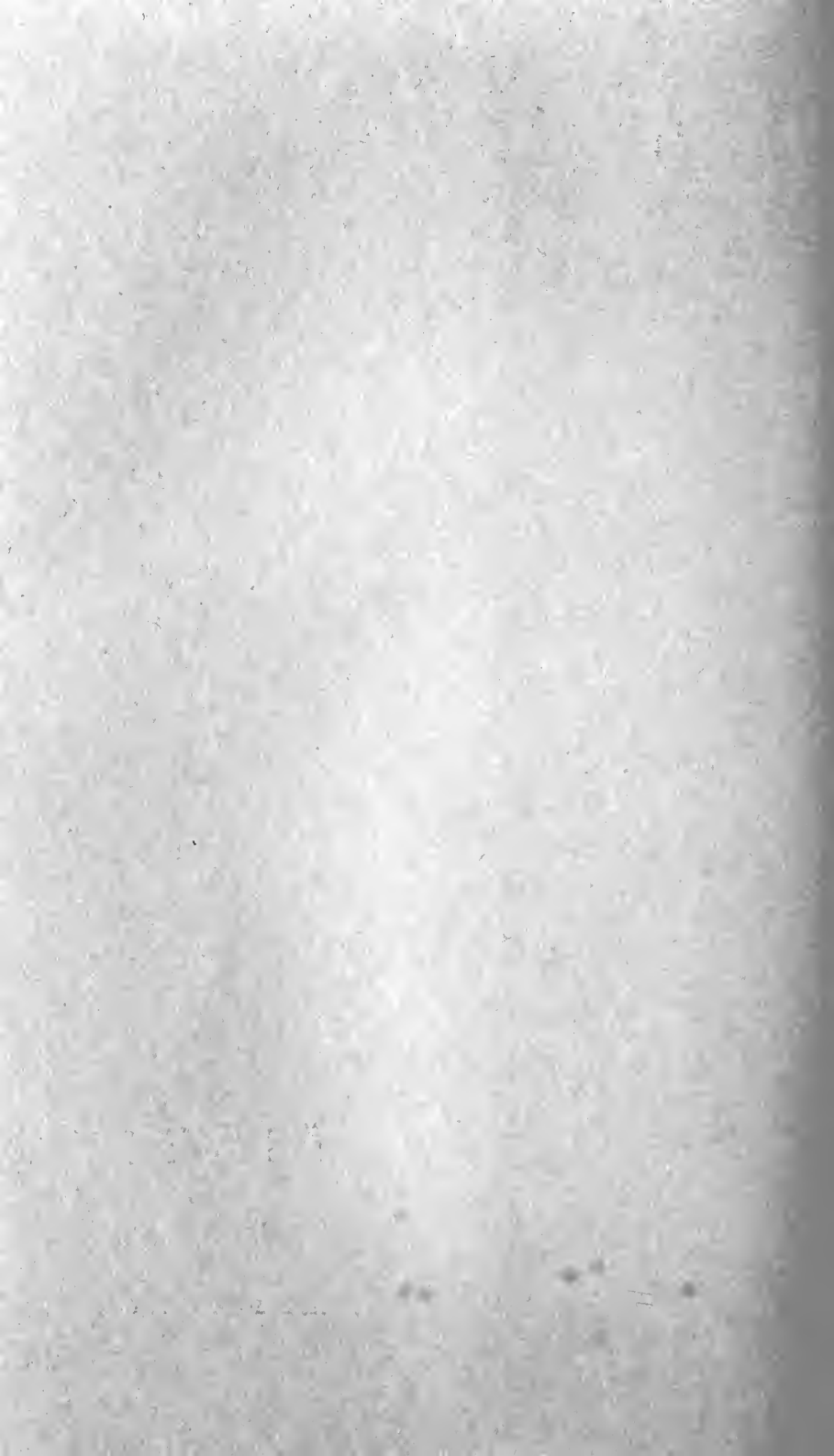
Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

JAN - 9 1952

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK



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**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

DOUGLAS MINER

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name?

A. Douglas D. Miner.

Q. What is your business?

A. I have an airplane maintenance shop on Boeing field.

Q. How long have you had that place of business at Boeing Field? A. Since 1939.

Q. What license do you hold from the CAA?

A. Aircraft and engine mechanic's license.

Q. Were you familiar with the airplane known as a Douglas DC-3 79025 which is the subject matter of this lawsuit? A. Yes.

Q. State whether or not you were present at Boeing Field the night that that airplane attempted to take off on the occasion on which it crashed.

A. Yes.

Q. Were you close enough to the airplane to hear the sound of its motors? [144] A. Yes.

Q. Where were you on the field that night?

A. On the northwest corner.

Q. How close were you to the airplane?

A. I would estimate about 500 feet west of the runway.

Q. Who was with you? A. Mr. Vineyard.

(Testimony of Douglas Miner.)

Q. Did you hear the motors revved up prior to the take-off? A. Yes.

Q. State whether or not they sounded in all respects normal? A. Yes.

Q. Were you in the same location that you have described when the airplane took off?

A. No. Mr. Vineyard and I drove to the east side of the concrete ramp to watch the take-off.

Q. Did that get you up closer to the airplane?

A. Yes.

Q. How close were you to the airplane as it took off, as it passed you?

A. I would estimate about 300 feet.

Q. What have you to say as to the sound of the motors during the take-off?

A. Absolutely normal. [145]

Q. Did the power appear to you to be applied evenly? A. Yes.

Q. Did you hear or observe anything that indicated to you any malfunctioning of the engines during the take-off? A. No.

Q. Had you examined or serviced this airplane in your shop a short time prior to take-off?

A. Yes.

Q. When an airplane is serviced, do you fill out a report covering what you did to the airplane and indicating its condition? A. Yes.

Q. Is that report filled out on a form that is prescribed by the Civil Aeronautics Administration?

A. It is approved by the Civil Aeronautics Administration.

(Testimony of Douglas Miner.)

(Copy of 400 hour inspection report marked Defendants' Exhibit A-11 for identification.)

Q. Handing you what has been marked as Defendant's Exhibit A-11 for identification, I will ask you if you can state what that exhibit is?

A. That is our form, that is the reproduction of our form we used to conduct an inspection on this aircraft.

Q. What type of inspection do you call that?

A. This is a 400 hour inspection.

Q. What other types of inspection do you have of [146] airplanes besides the 400 hour inspection?

A. This same form is used for the 100 hour inspection and we also have the 25 hour inspection.

Q. Is the 400 hour inspection a more thorough and complete inspection than the 25 hour or the turn around inspection? A. Yes.

Q. Is there any more thorough and complete type of inspection provided for than the type of inspection that is made and reported on that report that you have in your hand? A. No.

Q. What is the date of that report?

A. December 22, 1948.

Q. Can you tell from examining that report when you completed your examination and inspection of the airplane?

A. Yes, this form was completed December 22, 1948.

Q. What in your opinion was the mechanical condition of that airplane and all of its instruments

(Testimony of Douglas Miner.)

and component parts upon the date of the inspection, of your examination?

A. Very good condition.

(Copy of 25 hour inspection report marked Defendant's Exhibit A-12 for identification.)

Q. By 400 hour inspection, does that mean that is an inspection you make after each 400 hours of operation of the airplane? [147] A. Yes.

Mr. Matthews: We offer Defendant's Exhibit A-11.

Mr. Cluck: No objection.

The Court: Admitted.

(Defendant's Exhibit A-11 received in evidence.)

Q. I have handed you what has been marked for identification as Defendant's Exhibit A-12 and will ask you if you can state what that is?

A. That is a 25 hour or turn around inspection form.

Q. By whom was that inspection made?

A. Mr. Ramberg.

Q. Is he employed by you?

A. He was at the time.

Q. At the time this inspection was made?

A. Yes.

Q. Did he work under your supervision?

A. Yes.

Q. How many hours, if you know, had the airplane been operated between the time of the 400

(Testimony of Douglas Miner.)

hour inspection you have just testified concerning and the date of this 25 hour inspection which has been identified as Defendant's Exhibit A-12?

A. In accordance with this form, it says 22 hours and 40 minutes. [148]

Q. Did you run the motors after this 25 hour inspection was made? A. Yes.

Q. Did you say that you were familiar with the condition of the airplane following this 25 hour inspection? A. Yes.

Q. What was the date of that 25 hour inspection? What date was it completed?

A. January 2, 1949.

Q. That is the date of the crash? A. Yes.

Q. What, in your opinion, was the mechanical condition of the airplane and all of its instruments on January 2, 1949? A. Very good condition.

Mr. Matthews: I offer Defendant's Exhibit A-12.

Mr. Cluck: No objection.

The Court: Admitted.

(Defendant's Exhibit A-12 received in evidence.)

Form No. MA and E, 4-4-45 - rev

Seattle **25 HOUR OR TURN AROUND INSPECTION** *1-2-49*
(Owner)

Is Registration Certificate displayed in aircraft? *Yes* Is Airworthiness Certificate in aircraft? *Yes*
Has proper entry of this inspection been made in the appropriate log book? *Plate 11041 H-601*
Mechanic's recommendation: *Airworthy* Mechanic's Signature and No.: *Handwritten Signature* *151031448*
Pilot's Acceptance Signature: _____
Aircraft License No: *MT-25* Make: *Pitts* Model: *DC-3*
Number of hours since last inspection: *22:40*

NOTE: opinion of the following by marking (✓) for satisfactory, and (X) for unsatisfactory

	REMARKS
Surfaces inspected for damage or obvious defects	
Main fuel strainers and fuel tanks drained	
Propellers checked for cracks, nicks, oil leakage, or other damage	
Landing gear inspected for damage or obvious defects	
Shock struts inspected for proper inflation	
Brakes and parking brake controls checked for proper operation	
Wheels inspected for balance and condition and security of lock rings	
Hose clamps and connections checked for proper condition	
Sump tank in reservoir checked for sufficient oil	
Engines checked for evidence of throwing oil, leaks and failures	
Accessories, wiring inspected for damage or deterioration due to heat	
All cowling and inspection doors and covers checked for security	
Magnetos checked for proper operation	
Fuel pressure gauge checked for correct pressure	
Oil pressure gauge checked for correct pressure	
Oil temperature gauge checked for correct temperature	
Supercharger blower checked for proper operation	
Vacuum system checked for proper operation	
Antifreeze system checked for proper functioning	
Deicer boots checked for proper operation	
Position and landing lights inspected for proper time delay and condition	
Automatic pilot engaged and checked for proper operation	
Hydraulic pressure gauge checked for proper operation	
Ampmeter checked for indication of correct charge	
Tachometer checked for proper operation	
Hydraulic pumps checked for proper condition and functioning	
Toilet serviced, supply of water checked	
Hydraulic reservoirs checked for proper fluid level	
Antifreeze reservoirs checked for proper fluid level	

Pilot Squawks as Copied from Flight Log
Rep. position indicator not working
Action taken on Pilot Squawks
Adjusted indicator

Other Maintenance performed due to this inspection
overhauled control lines, replaced left aileron cable, replaced left vacuum pump, overhauled, replaced left fuel filter, checked oil level, all systems OK
Items needing repair that don't necessarily effect airworthiness:
2401
ADMITTED *10/11/1950*



(Testimony of Douglas Miner.)

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. Were you in charge of removing the frost and ice from the airplane prior to its departure that night?

Mr. Matthews: Objected to as improper cross-examination. [149]

Mr. Cluck: It is just a matter of how broadly one construes the matter covered. The construction we submit is that the matter of the engine run-up, the matter of preparing the plane generally, its pre-flight procedure, was in Mr. Miner's hands to the extent it was in the hands of any mechanic, and one phase of it which was not covered is this matter of ice and frost removal.

The Court: Sustained.

Q. (By Mr. Cluck): Did you cause records of the matter covered in your inspection sheets to be entered in logs of the airplane?

Mr. Matthews: Objected to as not proper cross-examination.

The Court: The objection is overruled.

The Witness: Yes, we noted in that part of the flight log called the pilot's flight record all maintenance that we performed.

Q. What logbooks were there relating to this airplane?

A. There was a logbook for each engine, each

(Testimony of Douglas Miner.)

propeller, and the air frame, and also the airplane flight record, which is a rougher draft of all the logs.

Q. Did you regularly make entries on those log-books from your inspection sheets?

A. Well, the inspection sheets were completed at the same time the pilot's flight record was signed off. [150]

Q. How long was your engine run-up that you mentioned before the plane took off?

A. The run-up that I made myself?

Q. Yes.

A. That generally takes about 15 minutes.

Q. Do you know how long a time the engines were run while it was being taxied?

A. Mr. Chavers and I taxied the airplane from the west side of the field to the administration building. That probably took about 15 minutes.

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. I am sorry, I didn't understand what you said about making entries in the airplane's logbook.

A. Well, it is part of the airplane flight logs that we call the pilot's flight record. That is a rougher draft of all the flight records and maintenance performed to the airplane.

Q. Is that in the form of a book?

A. Yes, it is a large book.

(Testimony of Douglas Miner.)

Q. Where is that book kept?

A. That is kept in the airplane at all times.

Q. Was that book current and in proper condition?

A. Yes. [151]

Q. I hand you Defendant's Exhibit A-11 and I specifically call your attention to an entry made after—under the heading "logbooks." Will you read the question and the answer that you filled in?

A. I didn't fill this in. This is signed by Mr. Ramberg.

Q. Did you make the entries in the logbook or Mr. Ramberg?

A. I suppose Mr. Ramberg did.

Q. Anyway, you know you didn't?

A. Well, I wouldn't swear to the fact, but it is customary that the——

Q. Just answer my question.

A. I wouldn't wear—I am not sure.

Q. So you don't know what the condition of the logbook was, whether it was current and up to date or not?

A. I am quite sure.

Q. Did you see it that night? Did you examine it?

A. Yes.

Q. When?

A. The—you are speaking of this large inspection form here, February 22?

Q. No, I am speaking of the logbooks, not the inspection form. Did you make any entries in the logbook?

A. From time to time I did, yes.

Q. When did you make the last one that you remember of? [152]

A. I don't recall.

Mr. Matthews: That is all.

Mr. Cluck: That is all.

The Court: You may step down.

E. L. RAMBERG

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name, please?

A. E. L. Ramberg.

Q. What is your business?

A. Aircraft mechanic.

Q. What license do you hold from the Civil Aeronautics Administration?

A. Aircraft and engine license.

Q. How long have you been an aircraft mechanic? A. 1946.

Q. How long have you held a license from the Civil Aeronautics Administration?

A. Since 1946.

Q. Were you employed by Mr. Douglas Miner on January 2, 1949? [153] A. Yes.

Q. I would like to have you examine, if you will, please, what has been marked for identification as Defendant's Exhibit A-11 and ask you if you can state what that is.

A. This is the 100 and 400 hour inspection form used by the company for which I work.

(Testimony of E. L. Ramberg.)

Q. Did you do the work that is referred to and described on that report?

A. I didn't do it all.

Q. Did you supervise? Was it done under your immediate supervision?

A. It was done under Mr. Miner's supervision, and I was more or less of a helper with other help.

Q. Did you fill out the report?

A. I filled the report out, yes.

Q. What have you to say as to the condition, mechanical condition, of that airplane and all of its instruments upon the completion of that 100 hour inspection and the work that you did in connection therewith?

A. Mechanically the airplane was in very fine condition at that time, at the completion of this inspection.

The Court: When was that with reference to the crash?

The Witness: This is dated December 22, 1948.

Q. I would now like to hand you what has been marked Defendant's Exhibit A-12 and ask you if you can state what [154] that exhibit is.

A. This is a 25 hour and turn around inspection form used by the company.

Q. Was that form filled out by you?

A. Yes, it was.

Q. When did you complete that 25 hour, so-called turn around inspection?

A. January 2, 1949.

Q. That was the date of the crash?

A. That is right.

(Testimony of E. L. Ramberg.)

Q. How long had the airplane been operated between the time of the 100 hour report and the 25 hour report, Exhibit A-12?

A. 22 hours and 40 minutes.

Q. What have you to say to the Court as to the mechanical condition of the airplane and all of its component parts upon the completion of that 25 hour inspection on January 2, 1949?

A. Mechanically it was in good shape.

Q. If you will refer again to Defendant's Exhibit A-11, on the first page of that exhibit, under the heading "logbooks" there is a question and an answer, and after the answer is a question mark. Will you read the question that precedes the question mark that appears on that form?

A. "Is aircraft log book available?" Is that the one [155] you want?

Q. No, the next question.

A. "Current and in proper condition."

Q. What is the question?

A. "Current and in proper condition."

Q. What was your answer to that question?

A. I put a question mark.

Q. What did you mean by that?

A. Simply that I didn't know that they were, that I didn't on the aircraft logs—I did not make an entry on the log books of the aircraft of this inspection.

Mr. Matthews: That is all.

Mr. Cluck: That is all.

The Court: You may step down. Call the next witness.

Mr. Matthews: This witness has asked me if he could be excused.

Mr. Cluck: All right.

The Court: Mr. Ramberg may be excused.

Mr. Matthews: Mr. Cuddeback, would you resume the stand?

The Court: Hearing no objection, he will resume the stand.

LEON D. CUDDEBACK

Direct Examination

(Continued)

By Mr. Matthews: [156]

The Court: Is there anything else about the statute you wish to mention?

Mr. Wilkerson: Yes, your Honor. I have 49 U.S.C.A. Sec. 581. It is in two paragraphs. The first paragraph as I interpret it, has nothing to do with the matter under consideration.

The second paragraph is as follows: "The records and reports of the former Air Safety Board shall be preserved in the custody of the secretary of the Civil Aeronautics Board in the same manner and subject to the same provisions respecting publication as the records and reports of the Authority, except that any publication thereof shall be styled 'Air Safety Board of the Civil Aeronautics Authority,' and that no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investi-

(Testimony of Leon D. Cuddeback.)

gation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.”

The investigations are conducted pursuant to 49 U.S.C.A., Sec. 425, which, curiously enough, has a somewhat contrary provision as to admissibility in evidence. Sec. 425 (d) provides as follows: “Except as may be otherwise provided in this chapter, the Board shall make a report in writing in all proceedings and investigations [157] under this chapter in which formal hearings have been held, and shall state in such report its conclusions together with its decision, order, or requirement in the premises. All such reports shall be entered of record and a copy thereof shall be furnished to all parties to the proceeding or investigation. The Board shall provide for the publication of such reports, and all other reports, orders, decisions, rules, and regulations issued by it under this chapter in such form and manner as may be best adapted for public information and use. Publications purporting to be published by the Board shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Board therein contained in all courts of the United States, and of the several States, Territories, and possessions thereof, and the District of Columbia, without further proof or authentication thereof.”

I think it is clear from the clear wording of the statute that the most that is forbidden is the report

(Testimony of Leon D. Cuddeback.)

or reports of the Board, and certainly a witness who happened to have some incidental connection with a hearing which resulted in a report may testify to facts within his own knowledge.

The Court: Is there anything further?

Mr. Cluck: Your Honor, we will reserve presentation [158] until we hear what question is submitted. I have in mind, in addition to what has been said, the fact that anything that is offered to the Board itself as such could not be submitted here as being hearsay. We agree that testimony may be given on the witness' own direct knowledge with regard to facts, even though he may have given the same testimony before the Board, but our point of view is that when he comes into this court he has to submit his testimony based upon his own personal knowledge and based upon the same considerations as though there had been no CAB hearing and report. That is the general position.

The Court: What is the citation of the last statute read, which provides under certain circumstances for use of information in courts?

Mr. Wilkerson: 49 U.S.C.A., Sec. 425 (d), which relates to the general powers and duties of the Board.

The Court: Which one was enacted by Congress first?

Mr. Wilkerson: The code note on 425 (d) states: June 23, 1938, c. 601, Sec. 205, 52 Stat. 984, Reorg. Plan No. IV, and——

The Court: When was 581 enacted or approved?

(Testimony of Leon D. Cuddeback.)

Mr. Wilkerson: Enacted the same date, June 23, 1938, c. 601, apparently part of the same enactment.

The Court: Do you contend that except insofar as the [159] statute specifically excludes material, all of the information is admissible?

Mr. Wilkerson: I think that is a fair interpretation of the two statutes. Otherwise, they may not be reconciled.

The Court: You may inquire. Read the question.

(Last question read by reporter as follows:

“Q. Did you so act in connection with the investigation of this accident?”)

Mr. Cluck: Our position on that whole matter comes down to this: we don't dispute the right of counsel for defendants to have a witness come into this court and offer factual information based upon his personal knowledge, even though he may have had some connection with the CAA hearing.

The thing this was leading up to, as I anticipated, was what counsel was asking this witness, and that in effect was to relate his part in the CAA hearing, and on the basis of that, that is what he reported to them, rather than upon the basis of what he is giving on his direct knowledge, to give facts to this Court.

I submit the wording as used in the statute, “no part of any report or reports,” is not confined simply to the printed final adjudication of the Board. It is a statute passed to assure that litiga-

(Testimony of Leon D. Cuddeback.)

tion shall not be [160] penalized by hearings where there is no opportunity to cross-examine on the part of counsel, and where the hearing is held for an entirely different purpose, and the purpose of the statute would not be served if instead of introducing some formal report designated as such the same witnesses were called who appeared at the hearing and asked to testify in this court what they had testified there, apart from personal knowledge, as they remember it now.

The Court: The objection as applied to this question is overruled. The question is, did you so act. Read the question.

(Last question read by reporter as follows:
“Q. Did you so act in connection with the investigation of this accident?”)

The Court: Answer yes or no.

The Witness: Yes.

Q. (By Mr. Matthews): In that connection, did you make a request upon any one or did you make a search for the log books of this airplane?

The Court: Answer yes or no.

The Witness: Yes.

Q. What efforts did you make in order to try and locate the log books?

A. During the course of the [161] investigation——

The Court: I think you should just state what you did.

The Witness: First, myself or my agents collected everything they could get hold of.

(Testimony of Leon D. Cuddeback.)

The Court: The question asks for what you did. Do not say what your agents did; say what you did.

The Witness: I directed the gathering of all material pertaining to that flight.

Q. State whether or not you made any effort to locate the log books of this airplane?

The Court: You mean he personally?

Mr. Matthews: Yes.

The Witness: Insofar as they were part of the records of this trip.

The Court: I think you can answer that question yes or no.

The Witness: Yes.

Q. What log books were you able to find?

A. I don't recall.

Q. Do you have any notes from which you can refresh your recollection?

A. The materials that were collected were made the subject of a public hearing and transcripts of that public hearing are available, and the notes would be in that. I do not have a copy of that transcript. [162]

The Court: If counsel believe that that matter referred to by the witness is a part of the report made by the CAB, then I think you should consider whether or not that is excluded by the statute.

Mr. Matthews: I wanted, in view of the witness' last statement—I have here the testimony of the notes which he refers to, a written report which he prepared covering this question of log books, and it is found starting on page 5 of this document

(Testimony of Leon D. Cuddeback.)

which I am now handing to the bailiff, and I would like to give the witness an opportunity to refresh his recollection.

The Court: Let opposing counsel see it. After that, if they have no objection, it may be shown to the witness.

Mr. Cluck: No objection.

The Court: I understand there is no objection to the witness making the use of it which you indicated. I think you should now repeat——

Mr. Dennis: I want to object to his doing any more than reading it. I want to object if there is any attempt to put it in evidence.

The Court: Do not state any words therein contained. You may read the words therein contained. Do so as promptly as you can. I believe you had in mind certain pages, did you not?

Mr. Matthews: Yes. If there is no objection, I will [163] withdraw this witness, let him have a chance to run through it, and put another witness on.

The Witness: You didn't give me the page that referred to the item that you were discussing here.

The Court: Court will be at recess ten minutes, and I ask you to be able to proceed with this witness from then on to a conclusion of this witness' testimony.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Matthews): Mr. Cuddeback, did

(Testimony of Leon D. Cuddeback.)

you locate a propeller log in the course of the search which we referred to previously? A. Yes.

Q. How many pages did that contain?

A. Two pages.

Q. Did any of the entries on those two pages pertain to the propellers currently installed on the airplane? A. No.

Q. Did you find an engine log book?

A. There were engine log books, book or books. I don't recall the number, whether there were one or more.

Q. What was the date of the last entry in the engine log book?

A. I would have to refer to notes to be certain of that. It was some time previous to this [164] flight.

Q. Would April 21, 1948, refresh your recollection? A. That sounds about right.

Q. Did that notation and entry pertain to either one of the engines currently installed on the airplane?

A. I would have to go back to my notes to be certain of that. It is my recollection that they were not.

Q. Did the aircraft log contain any accessory information?

The Court: Do you mean information as to the accessories on the engine, or some other accessories?

Mr. Matthews: I am using the witness' language. Perhaps he can explain it.

(Testimony of Leon D. Cuddeback.)

Q. What do you understand by the term "accessory information"?

A. Well, the accessories are various component parts of the aircraft.

Q. Such as?

A. Generators, batteries, instruments, their time of installation, and that sort of thing.

Q. Did the aircraft log contain any accessory information?

A. I would have to go back to notes.

Q. Will you look at your notes?

A. At the time of the investigation, I looked at these records and I made a report which I find I read into the public hearing, the record of the public hearing, at the time of the public hearing. That report was made by me after [165] personal inspection of such records as were made available during that investigation.

I might state that our instructions from the Civil Aeronautics Board, of which I am an employee, have interpreted the prohibition of use of the Board's records to the investigators themselves on matters they have found within an investigation, except for factual matters that might be of their own knowledge and which can't be adduced in court by any other means.

The Court: I have the impression of some such similar restriction being made to appear in some other litigation, and that is what has been part of the information in the mind of the Court, in some

(Testimony of Leon D. Cuddeback.)

of the statements made by the Court prior to this time during the course of the trial.

While we have the interruption on the subject, I would like to remind counsel in the case if, in view of the review of the statutory law which we have all had from the reading of it by Mr. Wilkerson during his last consideration of the subject, counsel in the case feel aggrieved, continue to feel aggrieved by reason of any previous ruling the Court has made in the progress of the trial, I invite you to call such grievance to the Court's attention at any and all times which you may avail yourselves of during this trial, and if no time [166] appears to normally suggest a review of the matter, I wish you to arrange for a time for presenting the matter to the Court again before this trial closes. You may proceed.

Q. (By Mr. Matthews): Did the aircraft log contain any accessory information?

A. I am checking my notes. Just a second, please. The aircraft log in this case was comprised of the pilot's flight reports and mechanics' maintenance reports, and may or may not have been the approved log book for that airplane. That would be in accordance with the C.A.A. approval of their operations procedure.

Q. Did the aircraft log which you examined contain any accessory information?

A. Apparently not.

Q. In accordance with your notes?

A. In accordance with my notes.

(Testimony of Leon D. Cuddeback.)

Q. I will ask you to state if the last inspection notation in the aircraft log was made on January 13, 1947, and the last trip notation October 22, 1948?

A. That is correct, according to my notes.

(C.A.B. report marked Defendants' Exhibit A-13 for identification.)

DEFENDANTS' EXHIBIT A-13

Civil Aeronautics Board

Certification of True Copy

Washington, September 20, 1950.

I Hereby Certify that the annexed is a true copy of the original C.A.B. Accident Investigation Report* of an accident involving a Douglas DC-3 aircraft, NC-79025, operated by Seattle Air Charter, an irregular air carrier, which occurred at Seattle, Washington, on January 2, 1949, on file in the Minutes Section, Civil Aeronautics Board, Washington, D. C.

/s/ MABEL McCART,

Chief, Minutes Section.

*Note: "No part of any report * * * of the Board * * * relating to any accident, or investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports. * * *" (Civil Aeronautics Act of 1938, Sec. 701(e).)

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

Office of the Secretary of the Board

I Hereby Certify that Mabel McCart, who signed the foregoing certificate, is now, and was at the time of signing, Chief, Minutes Section, C.A.B., and that full faith and credit should be given her certificate as such.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Civil Aeronautics Board to be affixed this twentieth day of September, one thousand nine hundred and fifty.

[Seal] /s/ [Indistinguishable.],
Secretary, Civil
Aeronautics Board.

SA-181

File No. 1-0002

Civil Aeronautics Board
Accident Investigation Report

Adopted: May 4, 1949

Released: May 4, 1949

Seattle Air Charter—Seattle, Washington
January 2, 1949

The Accident

At approximately 2205,* January 2, 1949, a Douglas DC-3, NC-79025, owned and operated by Seattle Air Charter, an irregular air carrier, crashed and

*All times referred to herein are Pacific Standard and based on the 24-hour clock.

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

burned following an attempted takeoff from Boeing Field, Seattle, Washington. Eleven of the 27 passengers and 3 crew members received fatal injuries. The aircraft was destroyed.

History of the Flight

A group of Yale University students returning to school following their Christmas vacation arranged with William F. Leland, sole owner and operator of Seattle Air Charter, to transport them from Seattle to New Haven, Connecticut, January 2, 1949. Departure was delayed because a full crew was not available at 1800 as had been originally planned. At approximately 2100 a crew was organized, consisting of G. W. Chavers, pilot; K. A. Love, copilot; and W. F. Leland, third crew member.

The flight taxied to Runway 13 for takeoff at 2138 and held because ground fog conditions restricted the visibility below the one mile minimum required for takeoff. The flight maintained radio contact with the control tower which advised the pilots of the existing weather conditions on the field. When the flight had taxied from the parking ramp, the tower reported, "Boeing Field weather is clear, visibility, $\frac{1}{2}$ variable to $\frac{1}{4}$ mile in all quadrants." The flight asked if they could take off. The tower replied: "Roger. We will let you out as far as traffic is concerned. You are cleared into position to hold." A few minutes later, at 2145, the flight requested their weather minimums for takeoff and

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

were told that they were ceiling 300 feet, and visibility one mile. To this, the flight responded, "If we take off we will be in violation, won't we?" The tower answered, "Yes." Shortly after this conversation, the tower again reported the visibility which was at that time restricted to $\frac{1}{8}$ mile.

After a period of 10 minutes during which time the flight continued to hold at the end of the runway, the tower remarked: "It appears we are getting a little break. Cleared into position and hold. We will have a clearance for you shortly." Immediately following, the flight's air route traffic control clearance was transmitted. Then, at 2201, the crew stated that they could see the four green range lights at the end of the runway, and that they were going to take off. These lights are located 5,700 feet from the approach end of runway 13, which is 7,500 feet in length. At 2204 the tower stated, "Cleared for take off report on top." At this time the weather as reported by the Weather Bureau was ceiling unlimited, thin obscurement, visibility one-fourth of a mile, restricted by fog. The airplane began its take off to the south, and for approximately 1,000 feet it appeared normal to observers who could see the navigation lights of the airplane. It then began to swerve to the left, becoming airborne approximately 1,800 feet down the runway on a heading 35 degrees to the left of the runway. Shortly after leaving the runway, the left wing dropped and the tip dragged on the ground

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

for a distance of 117 feet. The aircraft remained airborne for approximately 750 feet after leaving the runway, and then made contact with the ground in a landing attitude, tail wheel first. Upon contact with the ground, power to the engines was "cut." The aircraft rolled or skidded the remaining distance, approximately 700 feet, into a revetment hangar, immediately after which it was enveloped in flames.

As the tower watched the airplane's navigation lights, they realized that a crash was imminent and called the Boeing Field Fire Department which was located 1,300 feet south of the control tower, and 200 feet south of the revetment hangar into which the airplane crashed. The fire captain on duty heard the crash. He and 2 firemen, which comprised the duty crew that night, responded immediately, departing for the scene of the crash with all available equipment. This comprised a crash wagon and 2 pump trucks. The equipment arrived within a minute after the crash.

Investigation

It was found that the force of impact had completely crushed the nose of the aircraft and had telescoped it into the fuselage structure to approximately the position of the leading edge of the wing. Fire which immediately followed destroyed that portion of the fuselage forward of the main cabin door. During the fire fighting operation the wings

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

and the aft portion of the fuselage were pulled from the rest of the wreckage, and this resulted in breaking all of the control cables. The landing gear was found in the down and locked position, and the flaps in the "up" position. Trim tab control settings in the cockpit indicated that all trim tab control surfaces had been in the neutral position at the time of takeoff. Engine switches were found in the "on" position. Eighty per cent of the passenger seats were found broken from their floor attachments. All components of the aircraft were accounted for and no evidence of any structural or mechanical failure prior to impact was found.

Both engines were disassembled and inspected. This inspection revealed no indication that any of the internal working parts of the engines were not operating properly prior to the time of impact. Inspection of the master rod bearings revealed no evidence of over speeding on either engine. The disassembly of the engine accessories indicated that they were properly operating prior to the time of impact. Damage to the propellers, which were found in a low pitch position, showed that little power was being developed at the time of impact.

All the gyro instruments were removed from the wreckage and examined. It was found that all were clean and lubricated and were capable of normal operation before the accident. The directional gyroscopic instruments showed that the airplane was on

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

a heading between 90 and 95 degrees at the time of the crash.

During the day of January 2, while NC-79025 had been parked on the field without wing covers, snow fell from 1600 to 1700, leaving a deposit of 2 to 3 inches on the ground. The surface temperature at the beginning of the period was 39 degrees, but it fell below freezing by 1700. The first snow melted on contact with the aircraft and left a film of water on all its surfaces. With the lowering of temperature the water froze and the snow began to accumulate on the aircraft leaving a rough covering of frozen snow and slush.

The forecast for Boeing Field for the evening of January 2 indicated clear skies and visibility reduced to one mile by fog. It was expected that the fog would thicken causing ceiling and visibility to drop to zero by 2230. At 2015 patches of fog began drifting across the field, at which time the visibility was restricted to 1/16 of a mile.

Pilot Chavers had been briefed by the Weather Bureau at 1700 regarding the en route weather to Billings, Montana, the first refueling stop. This briefing indicated that with the possible exception of scattered snow showers the weather en route would be relatively good. At approximately 2100 Mr. Chavers was advised by the Weather Bureau that due to fog the local field conditions would remain variable with periods when both ceiling and visibility would be near zero. Between 2100 and the

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

time of takeoff Mr. Chavers made three calls by telephone to the control tower for reports of visibility. At no time did he receive information that visibility on the field was in excess of one-half mile.

Three transport type aircraft, two scheduled and one non-scheduled, took off from Boeing Field, Runway 13, between 2130 and 2200. The pilots of the scheduled aircraft testified that the visibility at the time of takeoff was $\frac{1}{4}$ to $\frac{1}{2}$ mile variable. The crew of the non-scheduled airplane testified that the visibility was slightly over a mile at the time of takeoff. These pilots stated that the takeoffs were routine and no difficulty was experienced due to runway ice, aircraft ice, or restricted visibility. The ice on the runway was smooth with no ruts. It was also found that the Boeing Field lighting system, including the runway lighting, was functioning normally the night of the accident. With a clear sky condition the takeoff visibility minimum for the scheduled carriers was $\frac{1}{4}$ mile, and for the non-scheduled carriers one mile.

At approximately 1800 an attempt was made to remove the snow and ice from the airplane, by dragging a rope over the wings and the horizontal tail surface. This removed some of the snow but none of the ice. Then a high pressure water hose was used. Loose snow and slush were washed free by the process, but a coating of clear ice formed where the water was applied, and it was at this time that ice accumulated on the under surfaces of the

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

wing. Both temperature and dew point were 29 degrees, and frost began to form on the iced surfaces of the airplane.

Emmett G. Flood, who had been obtained as one of the pilots to make the flight, arrived at the airport at approximately 1930 and examined the airplane. Because of the ice condition on the airplane, he refused to fly. According to Mr. Flood's statement, he returned home and, at approximately 2045, notified a CAA Aviation Safety Agent by telephone of the condition of the aircraft. According to the statement of the agent concerned, he received the information at home, at approximately 2150, after which he immediately notified his superior who resided nearby. During the time that he and his superior were conferring, they received notice that the accident had occurred.

Shortly after Mr. Flood left the field a third attempt was made to remove the ice from the aircraft by Leland, Chavers and Mr. Minor, a mechanic. This time an alcohol solution was applied to the wings and the tail surfaces of the aircraft. The mechanic testified that all ice was removed by this process; however, no attempt was made to remove ice on the under surfaces of the wings, and the mechanic did not examine this portion of the aircraft. At 2115 Mr. Chavers requested the advice of another pilot, a Mr. John Vineyard, concerning the effect of the ice on the aircraft. Mr. Vineyard examined the aircraft and then told Mr. Chavers

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

that if he intended to fly the airplane that night to obtain plenty of air speed before taking off. Mr. Vineyard later stated that when he examined the airplane, which was just before takeoff, he found a layer of clear ice covering the underside of both wings and patches of rime and clear ice on the top surfaces of the left wing. He also stated that he noticed heavy frost was forming rapidly on the top surfaces of the wings.

The maximum gross allowable takeoff weight for NC-79025 was 25,346 pounds. The average weight of the passengers as determined from the Yale University health records was approximately 160 pounds. Assuming the crew members to be the same weight, total weight of the passengers and crew would be 4,800 pounds. The weight of the fuel would be 3,814 pounds, and the weight of the baggage as shown by the passenger manifest was 533 pounds. The baggage was never weighed by any employee of Seattle Air Charter. Adding this weight to the empty weight of the aircraft, a total weight of 26,847 pounds is arrived at, which is 1,501 pounds greater than permissible takeoff weight. This overload reduced the margin of safety.

G. W. Chavers, age 33, held an airman certificate with a commercial pilot and instrument rating. He had a total of approximately 6,000 hours of flight time, over half of which had been obtained in multi-engine aircraft. Mr. Chavers had obtained his training in the United States Army Air Forces. His last

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

physical examination had been passed January 6, 1948. The copilot, Kenneth A. Love, age 39, held an airman certificate with a commercial pilot and instrument rating. He had a total of approximately 3,000 hours of flight time. Mr. Love had also received his flight training in the Army Air Forces. His last physical examination had been passed September 24, 1948. The third member of the crew, the owner of Seattle Air Charter, William Frederic Leland, age 31, held an airman certificate with a commercial pilot rating. There were no recent company records obtained of his flight time or experience; however, CAA records indicated that he had 466 flying hours at the date of application for his commercial certificate which was February 14, 1945.

Analysis

As stated above, a witness who examined the airplane shortly before the attempted takeoff found a coating of ice on the bottom surfaces of the wings. This witness also stated that he found patches of ice and frost on the top surfaces of the left wing. Formation of ice and frost on the wing would account for the failure of the flight to accomplish a normal takeoff, for ice and frost in addition to increasing the weight of the airplane, which was already 1,500 pounds over permissible takeoff weight, would tend to decrease the lifting qualities of the wings. It is also possible that the pilot did not have sufficient visibility to hold the airplane on

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

a straight course; however, his pilot experience included a reasonable amount of instrument training, and in view of this it can be reasonably expected that he would be able to continue the takeoff successfully by reference to instruments if all outside visible references were lost. Accordingly, the most logical explanation of this accident is that the airplane did not become normally airborne because of the ice and frost which is known to have existed on the wings.

Certainly the accident cannot be attributed to any mechanical failure in the airplane for all the evidence disclosed by the investigation indicated that the aircraft and all of its components were operating normally at the time of the crash.

Furthermore, this accident cannot be attributed to the manner in which the tower personnel dispatched their duties. The investigation showed that the tower continuously advised the flight of existing weather conditions on the field and that they adequately discharged their duties in providing traffic separation for arriving and departing aircraft. According to existing Civil Air Regulations, no other acts are required of, or duties imposed upon, tower personnel, and the pilot in command of the aircraft is solely and directly responsible for its safe operation.

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

Findings

Upon the basis of all available evidence the Board finds that:

1. The carrier, crew, and aircraft were properly certificated.

2. At the time of takeoff the airplane in addition to the weight of the ice, weighed approximately 26,847 pounds, which was 1,501 pounds in excess of its permissible takeoff weight.

3. At the time of takeoff ice covered the bottom surfaces of both wings, and patches of ice and frost were on the top surface of the left wing.

4. At the time of takeoff official weather at Boeing Field was ceiling unlimited, thin obscurement, visibility restricted to one-fourth of a mile by fog.

5. The pilot reported to the tower that he could see green range lights at the other end of the take-off runway, after which he was cleared for takeoff by the control tower. The green lights to which the pilot referred were 5,700 feet from the approach end of Runway 13, which is 7,500 feet in length.

6. The airport lighting system including that for the runway used was functioning normally.

7. After the airplane completed approximately 1,800 feet of the takeoff roll, it became airborne on

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)
a heading of 35 degrees to the left of the takeoff runway.

8. The left wing tip dragged the ground for a distance of 117 feet and the aircraft remained airborne for a distance of approximately 750 feet after which it made contact with the ground in a landing attitude.

9. Power to both engines was cut after the airplane touched the ground. It then crashed into a revetment hangar, and was immediately enveloped in flames.

10. No indication of any mechanical or structural failure in the aircraft or any of its components was found.

Probable Cause

The Board determines that the probable cause of this accident was the attempt to take off in an airplane which had formations of ice and frost on the surfaces of the wings.

By the Civil Aeronautics Board:

/s/ JOSEPH J. O'CONNELL, JR.,

/s/ OSWALD RYAN,

/s/ JOSH LEE,

/s/ HAROLD A. JONES,

/s/ RUSSELL B. ADAMS.

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

Supplemental Data

Investigation and Hearing

Civil Aeronautics Board, Region VII, was notified of the accident at approximately 2215, January 2, 1949, by CAA communications. An investigation was immediately initiated in accordance with provisions of Section 702 (a) (2) of the Civil Aeronautics Act of 1938, as amended. Investigators from the Civil Aeronautics Board Regional Office arrived at the scene of the accident at approximately 2250, January 2, 1949. Public hearing was ordered by the Civil Aeronautics Board and held in Seattle, Washington, January 18, 1949, in the Federal Court House.

Air Carrier

Seattle Air Charter, an unincorporated organization, was solely owned and operated by William F. Leland, Seattle, Washington. Seattle Air Charter held a letter of registration 7-85, dated August 8, 1947, giving the authority to operate as an irregular air carrier. It held a non-scheduled air carrier operating certificate issued June 4, 1947, No. 7-73. It was authorized to carry both passengers and cargo.

Flight Personnel

Captain G. W. Chavers, age 33, held an airman certificate with a commercial pilot and instrument

(Testimony of Leon D. Cuddeback.)

Defendants' Exhibit A-13—(Continued)

rating. He had a total of approximately 6,000 hours of flight time, over half of which had been obtained in multi-engine aircraft. His last CAA physical examination was on January 6, 1948. Copilot Kenneth A. Love, age 39, held an airman certificate with a commercial pilot and instrument rating. He had a total of approximately 3,000 hours at the time of the accident. His last CAA physical examination was on September 24, 1948. William Frederic Leland, age 31, held airman certificate with a commercial pilot rating. He had a total of 466 flying hours as of February 14, 1945.

The Aircraft

NC-79025 was a Douglas DC-3C. The aircraft was manufactured September, 1943, and was certificated by the Civil Aeronautics Administration September 11, 1946. On April 19, 1948, the aircraft received a required annual inspection and at that time was approved as airworthy. On December 22, 1948, a 100-hour inspection was accomplished by a certificated mechanic. It had been flown 5,419 hours since its manufacture, and was equipped with two Pratt and Whitney R-1830-90D engines and two Hamilton Standard Hydromatic propellers. The company files of Seattle Air Charter did not contain any current aircraft, engine, or propeller records.

Rejected.

(Testimony of Leon D. Cuddeback.)

Q. Handing you what has been marked for identification Defendants' Exhibit A-13, I will ask you if you can state [167] what that is?

A. That is the public release made by the Civil Aeronautics Board, May 4, 1949, which constitutes the Board's published report of the accident.

Q. Does that contain the findings of the Board as to the cause of the crash?

A. It contains a probable cause.

Q. Were you a member of the Board?

A. I am an employee of the Board. The Board itself is composed of five men, appointed by the President of the United States, who sit in Washington.

Q. Did you serve on this particular Board that investigated this crash?

A. I was in the investigation. The investigation, I might state for your information, the investigation is made in the field and the record is sent back to the Board for their final determination. They are the judge and jury.

Q. But that is the official public release and report of the Board?

A. Yes, sir.

Mr. Matthews: Your Honor, we want to offer this exhibit in order that we may squarely raise the question of the conflict of these two statutes. We offer this report pursuant to 49 U.S.C.A., Section 425(d).

Mr. Cluck: We object to it on several grounds. One [168] is that it is in direct violation of 49 U.S.C.A., Section 581. Another independent ob-

(Testimony of Leon D. Cuddeback.)

jection is that it is not certified or authenticated as would be required by statute. A further and independent ground is covered by a good deal of authority, which we will submit in an explanatory memorandum to the Court, on hearsay. There is an ALR annotation dealing rather exhaustively with this subject matter, as well as court decisions, to the general effect of holding that matters set forth in a report of this nature partake of the nature of hearsay testimony and are not admissible as between private litigants, especially when submitted for the truth of the matter asserted.

Mr. Matthews: We have, your Honor, a certified copy of the same report, and also call attention to the fact that this litigation is not confined strictly to private litigants, but that the United States of America is a party to this action. If it is on the question of certification, Mr. Chuck, I would like to substitute this certified copy for the one I have offered.

The Court: Let it be filed by a detachable device to what has been marked Defendants' Exhibit A-13 for identification, but do not put any clerk's marks on the certified copy yet. If you wish to thrash this matter out now so far as that statute is concerned, I will [169] undertake to assist you in that respect, but if you are going to ask that so far as this particular document is concerned, you wish to submit additional authorities which you do not have collected at this moment, and if it is convenient to the trial to hear those in the morning, the Court

(Testimony of Leon D. Cuddeback.)

will postpone the whole thing until tomorrow morning.

Mr. Cluck: We have additional authorities which I notice we do not have here this afternoon, dealing with the whole matter of utilizing administrative orders or findings in actions where the subject matter of the administrative proceeding comes up in such action, and we would like leave to submit those authorities, if the Court sees fit.

Mr. Matthews: That is agreeable, that the matter go over.

The Court: This matter will be reserved until tomorrow morning. I would like in the meantime to ask if this report is made public in the Federal Register with the same effect so far as notice to the public is concerned, in a way similar to the making of other contents of the Federal Register officially brought to the attention of the public.

Mr. Wilkerson: So far as I am advised, it is not. Perhaps the witness would have some information on that [170] subject. I found no statute requiring it.

The Court: Does anyone wish to ask the witness any information he may have concerning that?

Mr. Cluck: I had a question in reference to a related matter.

The Court: Is there anything else you wish to ask of this witness?

Mr. Matthews: No.

Mr. Cluck: Mr. Cuddeback, is the right of cross-examination accorded to operators whose operations

(Testimony of Leon D. Cuddeback.)

are made the subject matter of any investigation covered by such a report as you have referred to just now?

The Witness: I am not a lawyer. Cross-examination is not allowed. It is my understanding that that is correct.

Mr. Matthews: Don't you recall that Mr. Adams, who conducted the hearing, permitted anyone present to pass up questions to be asked to any of the witnesses and that if he considered those questions relevant or material he put those questions to the witnesses?

The Witness: That is correct.

Mr. Matthews: That is all.

Mr. Cluck: You know that some of those questions that were passed up were asked and some were not, do you not? [171]

The Witness: I believe that is right.

Mr. Cluck: And counsel were not permitted to interrogate witnesses directly either on cross-examination or direct examination, isn't that true?

The Witness: That is correct.

Mr. Cluck: That is all.

Mr. Matthews: Mr. Cluck and Mr. Houghton were both present during that examination and hearing, do you remember that?

The Witness: Mr. Cluck was there. I don't know whether they were both there all the time or not. They were there part of the time.

Mr. Cluck: We made the request, did we not, to call and examine our own witnesses and it was ex-

(Testimony of Leon D. Cuddeback.)

plained to us that this was not an adversary proceeding and therefore that privilege was not granted?

The Witness: I don't recall that specific instance. The legal member of the Board is the hearing officer and he attends to those matters, so it wouldn't be of personal knowledge to me, necessarily.

Mr. Cluck: You do know that we did not directly examine any witness, either on direct or upon cross-examinations? You know that, do you not?

The Witness: Yes, I know that.

Mr. Cluck: And that is the truth? [172]

The Witness: Yes.

The Court: You may step down.

JOHN O. VINEYARD, JR.

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name, sir?

A. John O. Vineyard, Jr.

Q. Where do you live?

A. Richland, Washington.

Q. What is your business?

A. I work for the Atomic Energy Commission as chief pilot.

(Testimony of John O. Vineyard, Jr.)

Q. Chief pilot for the Atomic Energy Commission?
A. That is right.

Q. With headquarters at Richland?

A. That is right.

Q. What flying experience have you had?

A. Approximately 5,500 hours total flying time. I have been flying for ten years.

Q. How much experience have you had in multiple-engine aircraft? [173]

A. Possibly 2,500 hours.

Q. What experience have you had flying under icing conditions?

A. Well, I have had about 155 hours instrument flying, and possibly 50 hours of that has been under some kind of icing conditions.

Q. Have you ever been employed by the CAA?

A. Yes, sir.

Q. The Civil Aeronautics Authority?

A. Yes, sir.

Q. In what capacity?

A. Safety agent, aviation safety agent.

Q. When were you so employed?

A. 1946, to October, 1948. I believe June, 1946, to October, 1948.

Q. What were your duties as safety agent?

A. To certificate pilots, make inspections of any navigational hazard, or investigation of accidents, helping the Civil Aeronautics Board in investigating accidents, and anything pertaining to safety for aviation.

(Testimony of John O. Vineyard, Jr.)

Q. Were you called down to Boeing Field on the night of January 2, 1949? A. Yes, sir.

Q. Who called you?

A. Mr. Chavers. [174]

Q. Did you know Mr. Chavers?

A. Very well.

Q. What had been your relationship with Mr. Chavers?

A. Mr. Chavers and I flew together in 1941, the year of 1941, and then went through Army Instructor School at Kelly Field in the latter part of 1941, and then we were connected when I was in ATC at Love Field, Dallas, Texas, for a short time. I have flown with him quite a bit.

Q. What time did you arrive down at the field, approximately? A. Approximately 9 o'clock.

Q. Did you see on that occasion the certain airplane described as a Douglas DC-3 No. 79025?

A. If that is the airplane in question, I did. I don't remember the number of it.

Q. I am referring to the airplane that crashed on Boeing Field on which the Yale students were riding. A. Yes, sir.

Q. You did see that airplane?

A. Yes, I did.

Q. Where was the airplane when you first saw it?

A. It was on the west side of the field, sitting on a large cement apron in front of Mr. Doug Miner's maintenance place.

Q. The west side of that field? That would be

(Testimony of John O. Vineyard, Jr.)

across [175] the field from the tower and the administration building? A. Yes, sir.

Q. State whether or not you examined the wing surfaces and fuselage of that plane?

A. Yes, I did.

Q. Will you state what that examination revealed and who was present at the time you made the examination?

A. When I arrived at the airplane, Mr. Chavers met me at the car and went with me on the examination. We went underneath the wings and examined those by feeling the under surface of the wings for icing and icicles and such as that. We started on the right wing, passed under the center section feeling our way and seeing as much as we could. We did not have the aid of a flashlight, but it was not necessary, to feel the icing conditions underneath the wing. We went over to the right wing——

Q. Before you leave the left wing, what were those icing conditions underneath the left wing?

A. Just about every rivet underneath the under surface of the wing had a very small icicle, possibly a quarter of an inch, from one-eighth to one-quarter inch long, where water had accumulated and dripped from that protruding place on the skin of the wing.

Q. How close, approximately, are those rivets together on the underside of the wing? [176]

A. They will vary, depending on the riveting them to the structure of the wing. Some of them

(Testimony of John O. Vineyard, Jr.)

are as close as maybe half an inch, and some of them are three or four inches apart. It depends on what section of the wing they are on.

Q. Go ahead and explain what examination you made of the right wing.

A. We made the same examination underneath of the right wing, and then came back to the——

Q. What did your examination of the right wing show?

A. Just about the same as the left wing, but I did not examine the top of the right wing where I did the left wing.

Q. What did your examination of the top of the left wing disclose?

A. Several spots of accumulated ice and heavy frost on the leading sections, up near the leading edge of the left wing, and several spots of rough ice along the middle of the wing.

Q. Can you give the Court some idea of the extent and size of these spots, and their condition as to roughness or smoothness?

A. I can't recall just how large they were, but they were oblong spots, and I don't think I could fairly estimate how big they were, maybe from six inches to eighteen inches; some of them maybe six inches across, some maybe eighteen [177] inches long.

Q. How many spots would you say there were on the top of the left wing in the places you have indicated?

A. Probably four or five.

Q. What percentage of the surface of the left

(Testimony of John O. Vineyard, Jr.)

wing would you say was covered, to the best of your judgment, with the spots of rough ice and frost?

A. That is very hard to put it in percentage, because I didn't make that close an inspection of how much the ice covered the wing. From standing on the ground and feeling as far as I could, and from the lights of the car shining up on the wing, I could just see the tops of rough places that I observed. I did not examine the wing on top like I did on the bottom.

Q. Was Mr. Leland there at the airport that night?

A. Yes, he was there at the airplane and he was standing near when we were examining the wings.

Q. In your opinion, Mr. Vineyard, was this airplane in a safe condition to take off at the time you examined it?

A. I can answer that by saying that I would not have tried to fly it off under its present condition, icing condition.

Q. What is your opinion as to whether or not it was safe for someone else to fly it off?

A. No, sir, I did not think it was safe to be taken out. [178]

Q. Did you express that opinion to anyone on that occasion? A. I did.

Q. Will you relate that conversation?

A. I told Mr. Chavers that I did not think that the airplane was safe to take out, and that if he did fly it away or did take off with it to use as

(Testimony of John O. Vineyard, Jr.)

much of the runway and get up as much speed as he possibly could before he tried to pull it off the ground.

Q. Why did you advise him to use as much runway as possible and get up as much speed as possible before he tried to take it off the ground?

A. Because of having ice or obstructions on the wings, such as heavy frost or anything on the wing, will spoil the air flow over the air foil to where it will cause your stalling speed to increase. In other words, you would have to go faster over the ground to get the airplane to fly because of this stalling speed increasing to a point where the disturbance will cause the inefficiency of the air foil.

Q. Will you explain briefly what it is that makes an airplane fly and the importance of a smooth surface on the wing of an airplane in connection with its lifting qualities?

A. The wing of an airplane is an air foil, so designed to cause lift as it is pulled through the air, and the skin on the wing of the airplane is made as smooth as possible [179] to cause a smooth flow of air over the wing, and much obstruction on the skin will cause a burbling effect of the air passing over the air foil to where it will disturb and make the wing less efficient than it would if it had a smooth surface to flow over, and cause it to be less efficient to have lift to make the airplane fly.

Q. What do you mean by a burbling effect?

(Testimony of John O. Vineyard, Jr.)

A. The air will tend to whirl. As it hits the little objects on the wing it will destroy them, flowing over it smooth, and the air will whirl like a little whirligig. It will whirl and not have a smooth flow to help lift the airplane off.

Q. If an airplane took off and had more frost or rough ice on the left wing than it had on the right, state whether or not there would be any tendency of the airplane to stall either in one direction or the other?

A. Yes, sir, it would. Both wings are an air foil. Both wings have to fly, or if one wing has less resistance on it than the other wing, it would fly sooner than the one that had the most resistance on it. If one wing had more snow or ice or frost on it, it would cause more resistance and it would have to be pulled through the air much faster than the wing that didn't have, so consequently the wing that would have the most resistance on it would stall out sooner than the one that was flying or the one that had less [180] resistance on it.

Q. So there will be no mistake about it, what do you mean when you say a wing stalling out?

A. The stalling condition is where a wing is slowed up to a slow speed, to where it will quit flying. It loses its efficiency.

Q. In other words, you could have a situation, if I understand your testimony correctly, if there was more ice on the left wing, or frost, than there was on the right, the right wing would fly and the

(Testimony of John O. Vineyard, Jr.)

right side of the plane would go up and the left side would dip down? A. That is right.

Q. State whether or not a condition such as that you have just described would have a tendency to cause the airplane to swerve to the left?

A. I would say that it would.

Q. Were you there at the time of the take-off?

A. Yes, sir.

Q. Were you there while the engines were revved up? A. Yes, sir.

Q. Where were you standing while the engines were revved up?

A. Just prior to take-off, is that what you mean?

Q. Yes.

A. I was in my car about 200 feet west on the cement [181] ramp west of the runway.

Q. Were you present when the airplane taxied from in front of Mr. Miner's maintenance shop out to the north end of runway 13 preparatory to take off? A. Yes, sir.

Q. When did you examine this ice with respect to the time that it taxied out to the end of the runway? A. Where was I?

Q. No, when did you examine the ice with respect to the time that it taxied out to the runway?

A. Just a few minutes, I would say just four or five minutes just prior to them taxiing it out, or maybe a little less than that, maybe three minutes.

Q. Is the condition you have heretofore described the condition the airplane was in when it taxied out to the end of the runway? A. Yes, sir.

(Testimony of John O. Vineyard, Jr.)

Q. Was any attempt made to remove the ice which you have described from the wings of the plane after it taxied out to the end of the runway there prior to take-off?

A. Not after I examined them, no, sir.

Q. What did you do next?

A. After the airplane taxied out to the end of the runway, Mr. Miner and I got in my car and drove over near the edge of the big cement ramp approximately 200 feet from [182] the west side of the runway.

Q. How close were you to the airplane at the time it passed in front of you on the take-off?

A. Approximately 200 feet.

Q. Were you able to see the airplane itself?

A. No, sir.

Q. What prevented you from seeing the airplane? A. Foggy condition.

Q. Could you see the range lights at the south end of runway 13, Boeing Field, at the time of the take-off? A. Not from my position, no, sir.

Q. Did you look down in that direction?

A. We looked for the runway lights, I did, and I couldn't even see those and I was within 200 feet of the runway.

Q. When you were parked in your car 200 feet from the runway, you could not see the runway lights that parallel the runway?

A. No, sir, I could not see the lights. I could see each one glow through the fog as it reflected

(Testimony of John O. Vineyard, Jr.)

on the water vapor in the air, I could see it glow from that, but actually seeing the light, I couldn't.

Q. Who was with you when you drove out to the edge of the runway?

A. Mr. Doug Miner. [183]

Q. What connection, if any, did he have with Mr. Leland's organization, if you know?

A. I don't know the exact connection, no, sir.

Q. Were you in his car when you drove out to the runway?

A. No, sir, it was our company car.

Q. State whether or not you did anything with respect to the lights on your car when you got out to the edge of the runway?

A. After they moved from the position where they first run their engines out to take-off position at the end of the runway, I flashed my lights several times trying to signal, and Mr. Chavers knew the signal that I was giving him, to not attempt to take off or get out of the airplane, because he had promised me that he would if it didn't look right.

Q. You had some conversation with him just before he taxied out to the end of the runway?

A. That is right, yes, sir.

Q. What had you told him?

A. I told him that the airplane wasn't safe and I wished he would get in the car and go on home with me, and he was being called into the airplane all the time we were having this conversation.

Q. By whom?

A. By Mr. Leland. Mr. Leland had started the

(Testimony of John O. Vineyard, Jr.)

right [184] engine, and I told him—he said, “Well, I’ll go on out and see what it looks like,” and I cannot remember just the exact words of the conversation, but he indicated that if he didn’t like the looks of it, he would get out.

Q. Had anything happened between the time they taxied out to the runway and the time they started the take-off that in your opinion increased the hazard of the take-off?

A. Well, the weather conditions was very variable that night, and at times you could see quite a ways and other times it would get so foggy you could see just a few feet ahead of you. At the particular time that they were running up their engines before they pulled out and in take-off position, it appeared to be clearing up a little bit, and just when they got out on the end of the runway, it seemed like it just come in, the fog was so thick you couldn’t see anything. That is about the only increased hazard that I would say.

Q. Do you have any recollection of about what the temperature was at the time of the take-off?

A. No, sir, not in degrees, but I know it was near freezing.

Q. Do you know what the condition of the runway was? A. No, sir.

Q. State whether or not you observed—what have you to say about the sound of the motors as to whether they sounded [185] normal or abnormal during the time they were being revved up or during the take-off?

(Testimony of John O. Vineyard, Jr.)

A. The motors sounded normal to me during the time of checking them prior to take-off, and then as the power was applied for take-off they sounded normal then.

Q. Did the power seem to you to be applied evenly? A. Yes, sir.

Q. Any spitting or backfiring?

A. No, sir.

Q. Any indication of anything unusual or abnormal that would indicate to you any mechanical failure during take-off?

A. Not from the sound of the engines. I thought that they were in trouble the minute I heard the first scrape, and I am not sure whether that was a wheel scraping or the wing tip scraping. That was the first sound, and immediately after that the power was pulled off the engines.

Q. Where did you and Mr. Miner go in the car which you were in?

A. We proceeded south down the edge of the cement apron to the south end of the field and then back up on the east side of the field to the scene of the accident.

Q. You were driving from north to south along the edge of the runway in the same direction in which the airplane had attempted to take off?

A. Yes, sir. [186]

Q. Will you describe what the visibility conditions were as you drove from the north end of the runway down to the south end of the runway

(Testimony of John O. Vineyard, Jr.)

immediately after the scraping noise that you heard?

A. The visibility was very limited. We at times had to look out the outside of the car, out through the window to drive, to keep from hitting other obstacles, other airplanes or light posts that was lined up along the ramp, to find our way down to the south end of the field and around the runway.

Q. How did the lighting conditions compare along this runway where you were driving as compared with out on runway 13? Was there any artificial lighting?

A. Yes, along the ramp they have overhead lighting, along where the airplanes are parked on the ramp, overhead lighting the same as the street lights out on the street in town.

Q. Does that provide more light or less light than there is out on the runway?

A. I would say they provide more light directly on the ramp.

Q. About how fast were you able to drive as you went north to south along the ramp?

A. Ten to fifteen miles an hour at the fastest.

Q. Notwithstanding this artificial light, you say you [187] had to put your head out the window to see where you were going?

A. At times we did, yes, sir.

Q. Did you examine the tracks that were made by this airplane the next morning? Were you there?

A. I examined the tracks shortly after the accident, after I got to the accident, and saw that the

(Testimony of John O. Vineyard, Jr.)

whole plane was on fire, the inside of the fuselage and in front. I got out of the car, and I don't know whether—I don't remember whether Mr. Miner accompanied me, but I walked out about half way to the runway looking at the tracks.

Q. What did you have for light at that time?

A. There was plenty of light there around that hangar that I could see. I didn't have a flashlight, and I went as far as I could distinguish the tracks before I turned around and came back.

Q. Were you there the next day?

A. Yes, sir.

Q. Did you make any further examination of the tracks left by the airplane the next day?

A. No, sir, I did not.

Q. Based upon what you saw that night concerning the condition of the airplane and all the other conditions and facts and circumstances that you have just testified to, will you state whether or not you have formed any opinion [188] as to the cause of the crash of this airplane?

A. In weighing all the——

Q. Have you formed an opinion?

A. Yes, I have.

Q. What is that opinion?

A. That it was a very hazardous operation.

Q. What do you consider caused the crash?

A. Weighing all the evidence that I have heard, and what I examined myself, I say between pilot proficiency and the icing conditions and possibly

(Testimony of John O. Vineyard, Jr.)

the overloading of the airplane that caused the crash.

Mr. Cluck: What was the first one you mentioned?

The Witness: Pilot proficiency.

The Court: What of those things did cause the crash, in your opinion, if you have an opinion?

The Witness: Well, sir, the combination of all, I think, are equally to blame for it. That is my opinion.

Q. What, in your opinion, caused the left wing to stall on the take-off?

A. Possibly the efficiency of the wing and not being at—not going through the air fast enough to fly, and it was still in a stalled condition when they tried to pull the airplane off the ground.

Q. In your opinion, was there enough ice on the left wing to materially affect the lifting qualities of the wing? [189]

A. Yes, sir.

Q. You have already testified you knew Mr. Chavers?

A. Yes.

Q. About how much did he weigh, in your opinion, on January 2, 1949?

A. Around 155 or 160.

Q. Did you know Mr. Leland?

A. Yes, sir.

Q. How much, in your opinion, did Mr. Leland weigh on January 2, 1950?

A. I would guess he weighed around 200 pounds.

Mr. Cluck: If your Honor please, I move that that answer be stricken. It is a matter of guess,

(Testimony of John O. Vineyard, Jr.)

and also the answer to the preceding question, where there is no evidence of what the conclusion as to weight is based upon.

Mr. Matthews: I believe the witness has testified he had been associated with Mr. Chavers for a number of years, knew him very well, had flown with him. We have authority to cite.

The Court: The objection as to the weight of Chavers is overruled.

Q. How long had you known Mr. Leland?

A. Since October, 1948, to the time of his death.

Q. Did you see him on more than one [190] occasion?

A. Almost every day that I was at the airport.

Q. Do you think from the opportunity that you had to see Mr. Chavers that you could form a reasonably accurate opinion as to his weight?

A. I know he was a very large man.

The Court: You said Mr. Chavers.

Mr. Matthews: Mr. Leland.

The Witness: I know he was a large man, but I am not an expert at guessing weights. It would have to be an estimate.

Q. What is your best estimate?

A. 200 pounds.

Q. Did you know Mr. Love? A. No, sir.

Q. What experience have you had in the operation of DC-3 airplanes?

A. I have gone through several schools in operations of DC-3 airplanes. In ATC I went through schooling on the airplane, on that type airplane.

(Testimony of John O. Vineyard, Jr.)

When I was with Trans World Airlines I went through first officer school and first officer training, and after nine months as first officer I went through captain's school, captain training on that type airplane, and have flown one approximately 2000 hours, or 2200 hours.

Q. Have you ever had occasion to file flight plans for [191] DC-3 airplanes? A. Yes, sir.

Q. Such as the one, the type that was involved in this accident? A. Yes, sir.

Q. In filing a flight plan, state whether or not it is customary to indicate the amount of fuel on board?

A. I believe it is a question of—no, now I am not positive about whether it is a question on that flight plan or whether it is the number of hours.

Q. I mean are you required on the flight plan to indicate either the amount of fuel in hours or gallons? A. Yes, sir.

Q. Have you filed flight plans for a DC-3?

A. Yes, sir.

Q. What allowance do you customarily make for fuel consumption in filing a flight plan on a DC-3?

A. You mean from the actual fuel consumption to what I would have in the airplane or required to put in the airplane?

Q. If you were going to make a flight that took, say, four hours of your flying time to your destination and your alternate, plus your leeway that

(Testimony of John O. Vineyard, Jr.)

is required by CAA regulations, say four hours, how much fuel would you provide in a DC-3?

A. There is a four hour flight, and there is a 45 minute [192] reserve required by the CAA.

Q. Assume that your flight and your reserve total four hours.

A. I would have over 400 gallons of gas.

Q. In your opinion, does safe practice of a DC-3 require that much gasoline, that would be 100 gallons per hour, for a DC-3?

A. I would say that would be a safe operation, 100 gallons an hour.

Q. Do you have any opinion as to whether or not it is customary that in computing flight plans and fuel consumption you use the factor of 100 gallons per hour?

A. From an operator's standpoint, I do not believe that they would use 100 gallons an hour. They would use what the manufacturer of that particular engine recommended. From a pilot's viewpoint, he would more than likely—the pilots I have flown with and have taken training with would compute the 100 gallons an hour for their own safety because of the difference between what the manufacturer actually recommended that it would burn and what it did burn. Some engines burn more than others.

Q. Would weather conditions such as bucking a head wind increase your fuel consumption?

A. Yes. If you are taking a flight that would require four hours and you had any indications of

(Testimony of John O. Vineyard, Jr.)

head winds, [193] instrument conditions or any adverse weather conditions, you would then be required, or you would take on more gasoline than just the four hour flight time, say a four hour flight time and 45 minutes reserve that the CAA required and another couple of hours to your alternate. You want to be sure you would have plenty of gas to buck any head winds or any adverse weather conditions to make safe operation into your alternate with a 45 minute reserve.

Q. If you examined a flight plan that was filed by Mr. Chavers, and on that flight plan in answer to the question "Fuel on board" was written "06:00," what would that mean to you?

A. 06:00?

Q. Yes, 06:00.

A. I would say that would be 06 o'clock or 0600 hours.

(Flight plan marked Defendants' Exhibit A-14 for identification.)

Q. Calling your attention to the space on that flight plan headed "Fuel on board," have you noted that entry? A. Yes, sir.

Q. What does that entry mean to you?

A. I would say that means six hours of flying, six hours fuel aboard.

Q. Which in a DC-3, in your opinion, would mean how much gasoline? [194]

A. If I were making it out, it would mean at least 600 gallons.

(Testimony of John O. Vineyard, Jr.)

Q. Did you say you have flown a great deal with Mr. Chavers? A. Yes, sir.

Q. Have you any opinion as to whether or not he might have had the same idea in mind in filling it out?

A. Yes, sir. I would say he would say 600 gallons. He would be assured of 600 gallons aboard.

Q. In other words, he would allow for 100 gallons an hour?

A. Yes, sir. That has always been our practice when we were flying together.

Mr. Matthews: You may inquire.

Cross-Examination

By Mr. Cluck:

Q. You mentioned two or three times that you had known Mr. Chavers for quite a little while?

A. Yes, sir.

Q. You knew of his reputation for pilot ability?

A. Yes, sir.

Q. State what it was.

A. I would say that Mr. Chavers was just about an average pilot. He wasn't above average.

Q. By comparison, how do you consider yourself?

A. Well, I would say that for the training that I have [195] had, the schools I have gone through and the grades that I know I have acquired. I might be just a little above average in comparison with him.

(Testimony of John O. Vineyard, Jr.)

Q. You think you are a somewhat better pilot?

A. In the schooling and background that I have had, I was a better pilot than Mr. Chavers, yes, sir.

Q. What was Mr. Chavers' reputation for being a cautious pilot? A. Very cautious.

Q. How did that compare with the average?

A. That is a very good mark for them, but I don't mean, whenever I say a better pilot. I don't mean he was more cautious than I. I mean there is a technique in a pilot that you have to consider. That is where you grade your pilot, in his technique in handling the particular airplane he is flying.

Q. You think you could fly where it would be cautious for Mr. Chavers not to?

A. Yes, sir. I have done so.

Q. How long had you known Mr. Chavers?

A. Since 1940.

Q. Had he ever been involved in any aircraft accident before this that you know of?

A. No, sir, not that I know of.

Q. What was his reputation generally for dependability [196] as a pilot, discharge of all his piloting functions?

A. Very good, as far as I know.

Q. Observance of duties and regulations?

A. Yes, sir.

Q. You indicated that you felt of the leading edge on the underside of both wings, is that correct?

A. No, sir, I didn't say anything about the

(Testimony of John O. Vineyard, Jr.)

leading edge of the underside. I said the under surface of the wings.

Q. From what point were you standing when you did that?

A. Walking underneath the wing, feeling in this manner (indicating). The wing is above my head and I am walking underneath the wing feeling of it in that manner.

Q. How much of the surface did you feel?

A. How much did I see or feel?

Q. Yes.

A. I would say probably 20 inches near the wing tip through the inner section of the center section.

Q. As far as the bottom side of the wings is concerned, did you notice any difference on either wing?

A. You mean the trailing edge underneath? No, sir.

Q. I mean the left as compared with the right wing.

A. Underneath?

Q. Yes.

A. No, I would say that they were both pretty well the same. [197]

Q. I understood you to say that the ice that you observed was small frost, that is, frost or ice crystal formations on the rivets of the aircraft, is that right?

A. No, sir, I did not say they were ice crystal formations. It was clear type ice. It was the type of ice that you can see through. That is the differ-

(Testimony of John O. Vineyard, Jr.)

ence between a rime ice and a clear ice. Rime ice is the frost type crystal such as you see in a refrigerator.

Q. It is the sight of the ice that determines it?

A. I beg your pardon?

Q. It is the way you look at the ice that determines it?

A. Yes, whether it is clear ice or rime ice. This was clear ice caused from water vapor that has formed on the rivets, which dripped down and frozen when it dripped down, caused the icicle.

Q. I understood you to say you examined the upper part of the left wing but not the upper part of the right wing, is that correct?

A. Yes, sir.

Q. You didn't examine the upper part of the right wing because it was too dark?

A. Yes, sir.

Q. As a matter of fact, it was a pretty dark night, wasn't it?

A. Yes, sir. Visibility was very limited. [198]

Q. You got your information concerning the underside of the wing as well as the upper side of the left wing by feeling the ice?

A. No, sir, not the upper side of the left wing. The automobile lights of my car was in such position that I could see up the slope of the wing, like this, and my car was here, and I could see up the slope because of the light reflecting on it.

Q. You saw the upper part of the left wing?

A. Yes, sir.

(Testimony of John O. Vineyard, Jr.)

Q. But you did not see the bottom part of either the right or left wing? A. That's right.

Q. Why did you say it was the clear ice when you defined clear ice as being the kind you see through?

A. It is a smooth ice. You can feel between spaces in the under part of the wing. It is smooth. Whenever you have a frost or a rime ice, it is crystal, little particles that will shed off immediately.

The Court: How do you spell the term that modifies the less transparent ice you were speaking of?

The Witness: R-i-m-e.

The Court: Do you wish the statement you were making read back to you so you can pick it up?

The Witness: Yes. [199]

(Last answer read by reporter.)

Q. Did you answer the question?

A. Well, not completely. To elaborate a little bit more, your clear ice is tougher, tougher to break, I mean harder to break off than rime ice would be, and would be sharper on the points. Say for an icicle, a small icicle, it would be sharper and tough, where rime ice or heavy frost would not be so tough and you could knock it off very easily with your hand.

Q. As far as the icicles are concerned, they were minute icicles on the rivets, isn't that right?

A. Very. They were very small.

(Testimony of John O. Vineyard, Jr.)

Q. And as far as the ice which you felt is concerned, apart from the rivets, it was very smooth?

A. Well, yes. I would say yes.

Q. You stated a while ago that if there was a good deal more ice on the left than on the right side of the wing, you might have a wing stall?

A. That is right, if there was ice.

Q. But if the ice was equally on the left and right wing, that would not be the case?

A. That is right.

Q. You don't know whether there was more ice on the left than on the right wing, do you?

A. From my knowledge, no, sir, because I didn't inspect [200] the top surface of the right wing.

Q. So that you have no knowledge at all as to whether there was more on one than on the other?

A. That is correct.

Q. Just a word more about Mr. Chavers' pilot proficiency. He had an instrument rating?

A. Yes, sir.

Q. Would you tell the Court just briefly what an instrument rating is?

A. An instrument rating is a rating that is issued by the Civil Aeronautics Administration for proficiency, to establish the proficiency of a pilot flying on actual instrument conditions.

Q. As far as you know, he was certified in every respect as a proficient pilot?

A. As a proficient pilot to his ratings, yes, sir.

Q. And his ratings covered the matter of flying a DC-3 type aircraft?

A. Yes, sir.

(Testimony of John O. Vineyard, Jr.)

Q. You mentioned as a possible cause of the accident the matter of overloading. Could you tell us how much weight there was in that airplane?

A. No, sir, I couldn't.

Q. As a matter of fact, if you had to give an estimate, you couldn't give an estimate honestly within 1000 pounds, [201] could you?

A. I think I could.

Q. But it would be a pure matter of estimate, wouldn't it?

A. I would form my estimate on all the evidence that I have heard in other cases and the case here.

Q. Confining your judgment on just what you have heard, will you tell us specifically what part of the evidence you have in mind, basing your opinion that overloading may have been a cause?

A. Not what I heard?

Q. At this trial, yes. What witness it was, when he testified.

A. No, not in this case, and I never stated that in my testimony a while ago.

Q. I realize you didn't but I want to have you clarify just what you did say, so that actually there is no basis so far in anything that you have heard in this case, apart from what you have heard in other cases, that would be a basis for any honest, reliable judgment that there was any overloading, isn't that true?

A. The latter part of your statement there, I would like to understand that better, about halfway through your statement.

(Testimony of John O. Vineyard, Jr.)

Q. To simplify it——

A. Did you say this case or any other case?

Q. No, this case alone. [202]

A. That is correct, I haven't.

Q. You stated that you had flown approximately 50 hours under some kind of icing conditions, is that correct? A. Yes, sir.

Q. Of that number of hours, how many were flown in a DC-3? A. The majority of it.

Q. Say 25?

A. It would be more than that. It would be up near 35. I have records of that, and I could give a more accurate figure, but that is appropriate.

Q. We just want an approximation. Did you observe other aircraft taking off from the same runway there shortly before this accident?

A. No, sir.

Mr. Matthews: Objected to, improper cross-examination.

The Court: The objection is sustained.

Q. Would you undertake to tell this Court that this particular airplane that was involved in this crash burned or did not burn a stated number of gallons per hour?

A. No, sir, I could not say.

Q. As a matter of fact, the number of gallons consumed per hour in a particular engine may vary considerably, is that true or not?

A. That is correct, yes, sir. [203]

Mr. Cluck: That is all.

Mr. Matthews: That is all.

The Court: You may step down. Have you another witness whose testimony will be short, or do you not have such a witness?

Mr. Matthews: Your Honor, I do not believe we have a short witness.

The Court: How many more witnesses have you to call? I wonder if we are on schedule with the trial.

Mr. Matthews: We have about four more.

The Court: What is your estimate as to whether the trial is on schedule at this stage?

Mr. Matthews: I think we will finish by noon tomorrow.

The Court: That is the third day, during which the plaintiff has taken about one-half day. Do you consider that the trial is on schedule or behind schedule?

Mr. Matthews: Your Honor, when we made the estimate of the time, counsel stated they thought their case would only take about thirty minutes, and we based our time accordingly, and that they would have very brief rebuttal, is that right?

Mr. Cluck: That is right.

Mr. Matthews: I think we should conclude tomorrow.

The Court: What do plaintiffs think about the prospect of concluding this trial tomorrow? [204]

Mr. Cluck: You understand, your Honor, this is just a matter of estimate. I would think we would complete the testimony by the end of the day tomorrow, provided defendants complete their part of

it by noon. That would leave the matter of argument. I think this is one of those cases where there should be a fair opportunity to present argument on the part of both sides, whatever time the Court thinks would be equitable, the following morning or any time it is convenient.

The Court: Court will be recessed until tomorrow morning at 9:30.

(At 4:55 o'clock p.m., Wednesday, October 11, 1950, proceedings adjourned until 9:30 o'clock a.m. Thursday, October 12, 1950.)

Seattle, Washington

October 12, 1950, 9:30 o'Clock A.M.

The Court: You may proceed.

VICTOR M. GANZER

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews: [205]

Q. Will you state your name, please?

A. Victor M. Ganzer.

Q. Where do you reside?

A. The address here, Seattle, Washington, 416 West Lee Street.

Q. What is your present occupation?

A. I am an associate professor of aeronautical engineering at the University of Washington.

(Testimony of Victor M. Ganzer.)

Q. What subject do you teach?

A. I teach aerodynamics.

Q. How long have you been an instructor in aerodynamics at the University of Washington?

A. It will be four years the first of January, 1951.

Q. What education or training have you had in aerodynamics?

A. I have a degree in mathematics, bachelor's degree in mathematics, and a Bachelor of Science degree in aeronautical engineering. The educational background, you mean?

Q. Yes, what college or university?

A. University of Washington.

Q. Upon completion of your formal education, what experience, if any, have you had in the practical application of aerodynamics?

A. I worked for the National Advisory Committee for Aeronautics at Moffett Field, California, for three years, from 1941 to 1944, during which time I was employed as an [206] aerodynamist in the high speed wind tunnel. In 1944——

Q. Before you leave that, what is this National Advisory Committee for Aeronautics? Will you tell the Court what its functions are and how it is set up?

A. The National Advisory Committee for Aeronautics is a committee appointed by the President of the United States, and it is the duty of that committee to hire people, engineers and other technicians, to perform aeronautical research. It is a

(Testimony of Victor M. Ganzer.)

Government organization, and the results of this research are made public in general, except in times of war, for instance, made public for the use of the industry and for the use of the military, and its prime duty is to perform research, aeronautical research.

Q. State whether or not that research includes the study of the flying characteristics of airplanes?

A. Yes.

Q. And safety factors? A. Yes.

Q. Following your tour of duty with this organization, by whom were you employed?

A. I was employed by the Boeing Aircraft Company—Boeing Airplane Company, now—for three years, from 1944 to 1947.

Q. In what capacity?

A. I was in the aerodynamics group and worked on the XB-47 airplane during all of that time. [207]

Q. What was your next assignment?

A. From there I went to the University of Washington.

Q. And have been there ever since?

A. Have been there since.

Q. Have you had any occasion to make any study or make any wind tunnel experiments or to familiarize yourself in any way with the effect of ice, frost or other foreign substance on the surface of the wing of an airplane?

A. One of the standard tests we did at the National Advisory Committee for Aeronautics was to simulate what could have been ice or other foreign

(Testimony of Victor M. Ganzer.)

substance on the top surface of the wing, by essentially gluing onto the wing particles. We used carborundum of a certain grain size on the upper surface of the wing, near the leading edge of the wing, and the purpose of that was to obtain the aerodynamic characteristics of these substances. It could have been ice particles or mud particles or any other particles that were adhering to the upper surface of the wing.

Q. Just how did you affix this carborundum to the upper surface of the wing?

A. In one of two ways. We would either paint glue on the leading edge of the wing, just with a brush, and then sprinkle the particles onto the glue so that it would adhere, or sometimes we sprinkled the particles on some Scotch tape, the transparent tape, and fastened the transparent tape to [208] the leading edge of the wings. Either of them had the same effect, as far as we could determine.

Q. The same effect as frost or ice, rime ice?

A. I mean the manner of attaching the particles didn't seem to have any effect on the aerodynamic characteristics. The particles themselves are the things that had the aerodynamic effect.

Q. This carborundum, can you give us in a manner which the layman can understand just how coarse or fine these particles were that you put just behind the leading edge, wherever it was?

A. The NACA had a standard roughness, and that consisted of particles of carborundum which were of an average size of .011 inches, slightly over

(Testimony of Victor M. Ganzer.)

one-hundredth of an inch on a 24-inch or two-foot chord model, and we tried to keep that general standard. If we reduced the size of the model to one-foot chord, we would try to get carborundum particles smaller than that, but that was the standard roughness, .011 inches on a two-foot chord model.

Q. That, you say, was sprinkled on the wing just behind the leading edge?

A. Yes, between 0 and 10 feet chord, in the first 10 feet of the wing, upon the top surface, on the leading edge.

Q. Then you would put this model in the wind tunnel which would simulate flying conditions?

A. That is right. [209]

Q. Will you state to the Court what effect, if any, this foreign substance that you have described had upon the flight characteristics or the lifting qualities of the wing of the airplane?

A. We found that at low angles of attack, which would correspond to very high speeds of the airplane, the effects were mostly in drag. The lifting effect, the lift was reduced slightly but not to a very large extent, but as the angle of attack increased, which would correspond to a high angle of attack and a low flying speed, that the lifting qualities were reduced to a very marked extent and the drag, of course, went up accordingly. Our conclusion would be——

Q. Before you leave that, is a plane in take-off at a high angle of attack or a low angle of attack?

(Testimony of Victor M. Ganzer.)

A. The airplane in take-off is at a comparatively high angle of attack.

Q. At a comparatively high speed or low speed?

A. I would say a low speed.

Q. State whether the effect of this foreign substance on the wing—what would it be in take-off, under take-off conditions? What would be its effect?

A. The effect would be to reduce the amount of lift that could be obtained from the wing at a certain speed. In other words, at a given speed one couldn't get as much lift from the wing with the foreign substance on as he could [210] without the foreign substance on.

Q. State whether or not this amount of carborundum which you placed just behind the leading edge of the wing, the first ten feet, to what extent would that affect the lifting qualities of the plane while in a take-off position?

A. Well, we found that the amount of lift reduction, the maximum lift reduction, was in the order of 20 to 30 per cent, depending upon the wing section, the wing profile, with an average of around 25 per cent. That was in the maximum lift you could obtain from a wing at any speed.

Q. State whether or not that condition would be aggravated to any extent by a loading of the plane in excess of its maximum take-off weight?

Mr. Cluck: We object to the question, your Honor, inasmuch as there is no evidence yet that there was any overloading in this case.

Mr. Matthews: We believe there is, your Honor.

(Testimony of Victor M. Ganzer.)

We have not spelled it out to the Court, but I believe with the manifest, the dry weight of the plane, the amount of gasoline, that we will be able to show the Court, based on the testimony that is now in evidence, that the plane was overloaded, and I can assure the Court that we will follow it up. This witness is from the University, and would like to be dismissed as soon as possible.

The Court: That objection is overruled, but I will [211] say the whole line of testimony is of no practical assistance to the Trial Court. In making a record for the Appellate Court, you may proceed. I will not deny you that privilege. I wish to hear evidence as it exists in this case, rather than evidence of experimentations. I will not deny you the privilege of making your record for the benefit of any reviewing court, but I do not wish to take the time of the Trial Court to pile up a lot of useless testimony, useless to the Trial Court. You may proceed.

Q. (By Mr. Matthews): What is the question?

(Last question read by reporter.)

A. Loading an airplane to a higher weight than its maximum take-off weight would mean that one would have to go faster in order to take off safely. I am not sure whether one could say that that aggravates a condition. It just means that the pilot should get more air speed before he takes off, if the plane is overloaded.

Q. Would this be a fair statement, that you

(Testimony of Victor M. Ganzer.)

would have less efficiency, less lifting qualities of the wing and you would have more load to lift?

A. That is right, with the ice.

Q. Assuming that you had a DC-3 airplane—you are familiar with that type airplane?

A. Yes, sir. [212]

Q. —and that there was an accumulation of rime ice and frost in patches approximately six inches wide and 18 inches long spotted irregularly across the surface of the left wing of an airplane; that underneath on the underneath surfaces of the wing there were icicles hanging down from the rivets which hold the skin of the wing onto the frame, and that these icicles were approximately a quarter of an inch in length; and that the airplane attempted a take-off, we will say for my first question that it was loaded to its maximum take-off load: what, in your opinion, would be the effect on such an airplane of this icing condition that I have described on the lifting characteristics and the performance of the airplane during take-off?

Mr. Cluck: I object, your Honor, to that question. In the first place, the inquiry was as to the effect if ice was on the upper surface of the left wing, clearly implying that the ice was not on the upper surface of the right wing, whereas Mr. Vineyard, who was the witness offered by counsel on that subject, said he couldn't say what if any ice was on the right wing because it was too dark, he saw the ice on the left. Therefore, the question in the absence of any testimony ice was on one wing

(Testimony of Victor M. Ganzer.)

and not the other, is clearly unfair and contrary to the evidence. Referring to the icicles, the same witness, Mr. Vineyard, testified, if my recollection is correct, [213] that they were minute icicles, one-eighth to one-quarter of an inch long from the rivets. Therefore, that information should be clarified. Finally, we submit that the plane had a maximum take-off load, that those terms maximum take-off load are ambiguous, have not been defined, may mean the load which if exceeded would tax the structural capacity of the aircraft, they may mean some load specified in some C.A.A. regulation, or they may mean one of several different things.

The Court: My view of the objection is that it relates to only one absent factual matter which may not correctly be stated in the suppositious question, namely, that one relating to the wing which the previous witness did not examine because of darkness. I think the condition of the question relating to that detail should be an appropriate assumption that no knowledge as to the icing condition on the surface of that wing was available, and I believe that would be more faithful to the condition of the evidence in the case.

As to the other matter about the icicles, the Court is not going to sustain objection upon that ground, but I think counsel in calling to the witness' attention that condition ought to be as careful as possible. The Court thinks that cross-examination ought to take care of any studied inaccuracies claimed by objecting counsel in [214] that respect, but I think

(Testimony of Victor M. Ganzer.)

you should consider the objection as to that and try to be as faithful in your submitting question in the detail as to the evidence on that point as possible. I am not prepared to say that one might not argue one way or the other about that detail. I think you should amend the question as to the condition so far as ice is concerned on the wing which was not inspected by the previous witness.

Q. (By Mr. Matthews): I would like to add to my question this amendment, that an inspection was made of the underneath surfaces of the wing and there was found these icicles varying in length from a quarter to an eighth of an inch in length hanging down from the rivets, that was clear ice caused by precipitation of water which had dripped down and frozen; and that the left wing was examined and these patches of rime ice and frost were found just behind the leading edge on the left wing, but no examination was made of the right wing of the airplane; what effect, if any, would the condition which I have described, in your opinion, have upon the flying characteristics of the plane during take-off?

A. Well, in my opinion, with regard to the icicles, first I would say that such a condition would not be very serious as far as the lift of the wing is concerned, on the underface of the wing, that is. The icicles on the underface of the wing would increase the drag of the airplane, would [215] require more power to be used to get up to a certain speed to take off, and also more power to fly, but

(Testimony of Victor M. Ganzer.)

probably would not have a very serious effect on the lift.

However, the upper surface of the wing is the surface which is extremely sensitive, and any ice or rime or particles of any kind on the upper surface of the wing are extremely important, and they are the ones which reduce the lift on the airplane. When taking off, if the pilot tried to take an airplane off at a speed which he was used to taking that airplane off, if he took off by an air speed indicator and if he had ice on the wings and did not know what the effect of that ice was going to be and did take off at that speed and pulled the airplane up to take off, he would find that the lift was not sufficient. The airplane may take off; it may just straggle through the air, depending on how much lift he loses. With respect to the right and left wing, all I could say would be whichever wing had more ice would probably be the most affected.

Q. You say most affected. Do you mean that would be the wing that would be inclined to stall first?

A. That would be the one that would lose the most lift, that's right.

Q. In your opinion, would the condition which I have described materially affect the flying characteristics of the airplane during take-off? [216]

A. I would say yes, that ice on the upper surface of the wing would have a very serious effect on the characteristics of the airplane during take-off, because take-off is a delicate time. The airplane is at

(Testimony of Victor M. Ganzer.)

a high angle of attack and it is trying to get a high lift coefficient, a high lift in order to take off, and any reduction in lift would be quite serious at that time.

Mr. Matthews: You may inquire.

Cross-Examination

By Mr. Cluck:

Q. Will you tell us what carborundum material is?

A. As far as I know, it is a natural material from which they make carborundum stones. The Court is probably familiar with carborundum stones.

Q. That is the stuff they put on sandpaper?

A. They use for grinding wheels, that is right. It is a rough granulated substance which comes in a powder and will be molded into a grinding wheel or put on sandpaper.

Q. You took that, I suppose, because the crystals suggested frost? A. That's right.

Q. What condition, in answering the last question asked you by counsel concerning the upper surface of the wing, what condition did you assume as to presence of ice or snow on this particular DC-3 aircraft? [217]

A. I am assuming, when I say that ice or snow has a very serious effect, that the ice or snow is toward the forward portion of the wing. The effect of any roughness on the upper surface of the wing is much more serious towards the front of the wing,

(Testimony of Victor M. Ganzer.)

toward the leading edge of the wing, than toward the trailing edge of the wing, and any ice or snow or any accumulation near the front of the wing on the upper surface is extremely serious.

Q. The effect of ice or snow on the rear portions would be considered less serious?

A. That's right.

Q. How much ice or snow did you assume was on the wing of this particular airplane?

A. I don't—I haven't made any assumption as to that. All I can say to that is that from our wind tunnel tests, if those are permissible, that a very small portion of substances is sufficient to have a serious effect. We have made wind tunnel tests with about five or ten per cent of the surface covered with these particles, in other words, a very few particles, and that had a very serious effect on the aerodynamic characteristics of the wing. Five or ten per cent of the surface between the leading edge, that is.

Q. The extent of the effect varies considerably with the type of aircraft and the manner in which it is flown, isn't that true? [218]

A. Well, I would say no. I think that question would require some interpretation.

Q. Let's refer to type of aircraft. You recognize that there are very different types of air foils on different types of aircraft? A. That is right.

Q. Each has its own flight characteristics within wide variations?

(Testimony of Victor M. Ganzer.)

A. Well, not as wide as you might imagine, I think.

Q. You wouldn't say a B-17 flies the same as a pursuit plane, would you?

A. I would say roughly yes, that in many attitudes a B-17 flies roughly the same as a pursuit airplane.

Q. Did you make any experiments with DC-3 type aircraft?

A. We have made experiments with DC-3 type wing, the air foil section itself, but not with DC-3 type airplane, that I have been personally acquainted with, at any rate, but with the type, their wing section, yes.

Q. But you made no experiment with the aircraft itself? A. Not with the aircraft.

Q. Have you ever piloted a DC-3?

A. No, I haven't.

Q. Have you ever investigated any accidents concerning icing conditions on any such DC-3 aircraft? A. No, I haven't. [219]

Q. Did you make any study of this particular accident at all, aside from making your information available from the experiments you conducted?

A. I, personally, have not studied the accident, no.

Q. So that you actually know nothing about it?

A. What do you mean, I actually know nothing about it?

Q. I mean just that, except as you may have heard it from third parties?

(Testimony of Victor M. Ganzer.)

A. I would say that all I know about the accident is what I have read.

Q. It is true, isn't it, that the lift on any air foil is greater on the upper than the lower surface? What I mean is that the upper surface is more important as far as its lift characteristics are concerned in terms of percentage of lifting effect?

A. I don't think so. You can't have an upper surface without a lower surface, and you can't have any lift without both surfaces, actually. Technically not. It is a common supposition that the upper surface is the most important, but that may be due to the fact that the pressures on the upper surface of the wing will vary more from atmospheric pressure, let's say, than do the pressures on the lower surface of the wing, but the lift comes from the pressure across the wing from the upper to the lower, so you have to have both surfaces in order to get lift. I might say, in line with this [220] question, that the velocities are higher on the upper surface of the wing, and that is where this statement comes from, and since the velocities on the upper surface are higher, that is why they are more subject to being disturbed by particles than on the lower surface.

Mr. Cluck: That is all.

Mr. Matthews: That is all.

The Court: Step down. Call another witness.

Mr. Matthews: May Professor Ganzer be excused, your Honor?

The Court: Any objection?

Mr. Cluck: No, your Honor.

The Court: Professor Ganzer is excused.

A. ELLIOTT MERRILL

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wilkerson:

Q. Will you state your name, please?

A. A. Elliott Merrill.

Q. Where do you reside?

A. 10843 Sixth Avenue South, Seattle.

Q. What is your age? [221] A. 49.

Q. Where are you presently employed?

A. By the Boeing Airplane Company.

Q. What is your position with the Boeing Airplane Company?

A. I have charge of the flight test section.

Q. Will you explain to the Court what duties you have in that capacity?

A. Well, I have charge of all the flight testing work on Boeing airplanes here in Seattle.

Q. What is your educational background?

A. Well, I am a graduate engineer, University of Washington.

Q. In what year did you graduate?

A. 1926.

Q. What has been your experience since that time?

A. I have spent all of my time since then as a pilot in various capacities, both military and commercial.

(Testimony of A. Elliott Merrill.)

Q. How many hours of flight experience have you had? A. About 6,500.

Q. How long have you been with the Boeing Airplane Company? A. About ten years.

Q. Has your capacity with Boeing been the same during that ten years? A. Yes.

Q. What effect does ice on the wings of an airplane have on its flight characteristics? [222]

A. Well, it affects flight characteristics in various manners, depending on the nature of the ice and the amount of the ice. Normally or generally it always spoils the flight characteristics of a wing.

Q. Just how does that come about?

A. By disrupting the smooth airflow over or under the wing.

Q. Does it affect the lifting power of the wing?

A. Yes.

Q. In what way?

A. The lifting power of a wing again depends upon the smoothness of the airflow over the wing, and anything that disrupts the smoothness reduces the lift on the wing; two reasons, it increases the drag, which increases the turbulence, reduces the lowered air pressure over the wing.

Q. Does it affect or change the speed at which the airplane will stall? A. Yes, sir.

Q. In what degree?

A. Well, it always increases the speed at which the air foil—it lowers the speed at which the air foil will stall.

(Testimony of A. Elliott Merrill.)

Q. Does ice have a greater effect on take-off than on subsequent flight of the airplane?

A. Yes, it does. [223]

Q. You heard the testimony of Mr. Vineyard yesterday, did you not? A. Yes, sir.

Q. With respect to the condition of the airplane at the time of the attempted take-off and the condition of the weather at the time this plane NC 79025 attempted to take off on the night of January 2, 1949, at Boeing Field, did you not?

A. Yes, sir.

Q. You are acquainted with the runway at Boeing Field? A. Yes.

Q. You saw the airplane the next morning, on the morning of January 3rd? A. Yes.

Q. How far is it from the north end of Boeing Field to the revetment hangar where the plane crashed? A. Probably 4,000 feet.

Q. Assuming that the condition of the airplane and the weather was as stated by Mr. Vineyard; and that the temperature as reported by the Weather Bureau at Boeing Field was 28 degrees: Would you be in a position to formulate an opinion as to whether it would be safe practice to take off an airplane with a load of passengers under those conditions? A. Yes.

Q. What is your opinion? [224]

A. My opinion is that it is a hazardous undertaking.

Q. Assuming the facts assumed in my previous question with respect to the weather and condition

(Testimony of A. Elliott Merrill.)

of the airplane; and assuming that during the attempted take-off the motors of the airplane sounded as though they were operating normally; and that after the crash and fire of the airplane the motors, propellers and instruments were inspected and no evidence of mechanical failure found: Would you be able to formulate an opinion as to the cause of the crash? A. Yes.

Q. What is your opinion?

A. My opinion is that the airplane never reached a safe flying air speed.

Q. Why did it not?

A. My opinion there would be that the pilot attempted to fly the airplane at too low an air speed. He did not have a proper air speed to fly the airplane under the existing conditions.

Q. By the existing conditions, you mean the ice and weather and the load? A. Yes, sir.

Mr. Wilkerson: You may cross-examine.

Cross-Examination

By Mr. Cluck:

Q. Mr. Merrill, your connection with this accident has [225] been confined to the testimony you have heard here in court, is that it?

A. Yes, sir.

Q. Have you been in attendance right along?

A. No, I don't believe so. I was here yesterday afternoon for the first time.

Q. How long were you here then?

A. All afternoon.

(Testimony of A. Elliott Merrill.)

Q. Apart from what counsel may have told you, that is the extent of your knowledge of the accident, is it? A. No, sir.

Q. You have read about it?

A. I have read about it and also talked to some of the people involved the next morning.

Q. Assuming that a plane was overloaded by two tons, to take an extreme case, would there be anything in that situation that would cause it to lose its right and left directional course if the rudder control were available? A. No, I don't believe so.

Q. In other words, overloading has nothing to do with keeping a plane on the course of a runway?

A. Generally, no.

Q. Just to take another extreme illustration, if you took blocks of ice a foot thick, piled right across the top wing of an airplane, and another set across the bottom of a [226] wing, would that drive the pilot off his right and left directional movement as long as he had rudder control?

A. I think the way you put it, it would.

Q. Take any case of extreme icing, as long as the ice is uniformly distributed over the air foil the pilot still has control of his plane in taxiing, doesn't he?

Mr. Wilkerson: I don't believe, if the Court please, the evidence shows the ice was uniformly distributed all over the airplane. The testimony of Mr. Vineyard was that there were spots and patches and irregular forms and shapes scattered over the plane.

(Testimony of A. Elliott Merrill.)

The Court: Read the question.

(Last question read by reporter.)

The Court: I ask examining counsel to take the opportunity of making any response which he thinks he should to the objection stated.

Mr. Wilkerson: Certainly not proper cross-examination, your Honor.

Mr. Cluck: On the effects of ice on the air foil.

The Court: The objection is overruled. This is cross-examination, and any further redirect that needs clarification on the facts in this question submitted by the cross-examiner may be gone into by counsel for defendants. Read the question.

(Last question read by reporter.) [227]

A. That is a rather difficult question to give a simple answer to. I would put it this way, the ice on the wing, if it was uniform, would have no effect on rudder effectiveness.

Q. It wouldn't have any effect then on right and left directional control with the rudders?

A. Well, I can't answer that simply, either. Generally the rudder is not affected, that is, its effectiveness is not determined by any ice or amount of ice on the wing. However, the drag on the wing can be changed and altered by the amount of ice on the wing, and that requires, of course, proper operation of the rudder.

Q. And up to the time a plane gets flying speed on either wing, the same thing would apply, would it not?

A. Yes, sir.

(Testimony of A. Elliott Merrill.)

Q. What are some of the causes of an airplane that might cause it to veer right or left from the runway in course of take-off, apart from icing or overloading?

Mr. Wilkerson: I object to that as not being proper cross-examination.

The Court: The objection is overruled.

The Witness: There are several causes. Cross winds will sometimes cause an airplane to veer from a course down the runway. Sometimes an uneven smoothness of the runway surface may cause [228] it.

The Court: Are you likely to get such a condition as those you last described in a so-called experimental wind tunnel?

The Witness: No, sir, I don't believe so.

The Court: Have you seen any experimental wind tunnel where those forces or factors were applied to the experiment, those cross wind factors?

The Witness: There are some tests conducted in wind tunnels in which the airplane is altered in its position to study the effect of what would be a cross wind, yes, sir. That is not very common.

The Court: In other words, suppose you were using this room as a wind tunnel for an experiment and the room had the necessary openings to conduct either at one end or the other or at both ends, would you be likely to get a cross current or cross wind effect comparable to that which is sometimes experienced out in the open on open airfields?

The Witness: No, sir, I don't believe so.

The Court: If you were flying an airplane in a

(Testimony of A. Elliott Merrill.)

canyon or a gorge like the Columbia River Gorge, the same velocity of wind might have a different effect upon it than the same velocity of wind would have on the plane flying over open desert country, would it not?

The Witness: Yes, sir. [229]

The Court: You may inquire.

Q. (By Mr. Cluck): What are some of the other possible causes?

Mr. Matthews: I object to the question, your Honor, as being too speculative, remote.

The Court: The objection is overruled.

Q. What about the matter of a runaway prop on either engine?

A. That would produce a yawing effect.

Q. Your engines both might be functioning normally and cause a failure of your propeller governor, one prop may turn faster than the other, is that correct?

A. Yes, sir.

Q. The one that turns faster will have a tendency to pull that side of the airplane off the runway unless the engines are immediately stopped, isn't that correct?

A. Yes, sir.

Q. What about the matter of tabs? Can you tell us what a rudder tab is, for example?

A. Yes. Airplanes usually when they are completed are not perfectly symmetrical, and as a result it is necessary to trim the controls, the flight controls, in order to make the airplane fly straight and level or directionally straight, laterally level, so small auxiliary surfaces are fastened onto the main

(Testimony of A. Elliott Merrill.)

controls which the pilot uses to make slight [230] trim changes in the airplane's attitude or direction. Those are commonly known as tabs.

Q. In the case of a rudder tab, if it is turned inadvertently on take-off for full left or right position, what is the effect on the airplane?

A. That would tend to turn the airplane, yes.

Q. In the direction in which it is set?

A. No, it turns it in the opposite direction.

Q. The opposite direction, excuse me. What about the automatic pilot? What is the effect of an automatic pilot if it should be on during the course of take-off and the heading on the automatic pilot, the heading for which it is set, is different from that of the runway?

A. If it was possible to have the automatic pilot connected to the controls during a take-off and the automatic pilot had not been stabilized or final adjustments made in it, it would undoubtedly cause the airplane to veer from the runway or to change the attitude of the airplane.

Q. You say "if possible." It is possible to have the automatic pilot on during the course of take-off if a pilot should overlook it, isn't that true?

A. Some automatic pilots can be and some cannot.

Q. Do you know about the automatic pilot on this particular DC-3 airplane?

A. No, I do not. [231-2]

Q. What is meant by an instrument take-off?

A. It is a take-off commonly understood to re-

(Testimony of A. Elliott Merrill.)

quire the pilot's complete attention to his instruments to determine the attitude and direction of the airplane and not normally use outside visual reference.

Q. A take-off, in other words, solely by reference to instruments in the cockpit instead of contact with outside objects, is that it? A. That is right.

Q. When we speak of an airplane flying on instruments, we mean essentially that as far as flight is concerned? A. Yes.

Q. In the course of take-off under instrument conditions, the failure of any one of the directional instruments would affect the course of take-off, would it not, or might?

A. It might; not necessarily, though.

Q. If the take-off were made on contact, that is, with reference to visual runway conditions, and so forth, what would be the effect of stoppage of your windshield swipes?

A. It would undoubtedly reduce the transparency of the windshield and to some extent reduce the pilot's vision.

Q. In your rather extensive experience in aircraft, state whether or not it does not happen more or less frequently that an airplane which passes inspection nevertheless experiences some failure in some mechanical part a relatively [233] short time after the inspection is made?

A. Yes, that happens occasionally.

Q. That can come from metal fatigue, can it not?

A. It could.

(Testimony of A. Elliott Merrill.)

Q. That is, the metal approaches a point of wear when it gives out at an unpredictable moment, isn't that true? A. That is right.

Q. And in any mechanism having a number of moving mechanical parts, the possibility of that is proportionately increased, is that not true?

A. Yes.

Q. In other words, the more complex this particular mechanism is, whether it is an automobile, sewing machine or airplane, the more likely in general—the more substantial is the possibility of failure at some unpredictable time, despite inspections?

A. Yes.

Mr. Cluck: That is all.

Redirect Examination

By Mr. Wilkerson:

Q. Mr. Merrill, counsel has inquired in detail concerning many things which might possibly happen in the taking off of an airplane. I will ask you if in forming your opinion concerning the cause of the crash, you considered the possibility of all those things happening? [234] A. Yes, I have.

Mr. Wilkerson: That is all.

The Court: You may be excused. Call the next witness.

Mr. Wilkerson: I will ask Court and counsel if Mr. Merrill may be excused?

Mr. Cluck: Yes.

The Court: Mr. Merrill is excused.

JOHN B. SWEET, JR.

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. Will you state your name?

A. John B. Sweet, Jr.

Q. Where do you live?

A. Edmonds, Washington.

Q. What is your business?

A. I am an aviation insurance underwriter.

Q. By whom are you employed?

A. D. K. MacDonald & Company.

Q. In what department?

A. In their aviation insurance department.

Q. How long have you been there? [235]

A. Since February of 1946.

Q. Are you familiar with the coverage that was written on the airplane owned by Mr. Leland that has been the subject matter of this litigation, a DC-3 No. 79025? A. I am.

Q. Are you familiar with the records and files of D. K. MacDonald concerning that coverage?

A. I am.

Q. State whether or not all of the endorsements, amendments to the matter pertaining to that coverage are kept in one file in your office?

A. They are.

Q. Are you familiar with that file?

(Testimony of John B. Sweet, Jr.)

A. Yes.

Q. If any written consent was ever given by D. K. MacDonald to waive any of the terms and conditions of that coverage, would a copy of that endorsement be in the file with which you are familiar?

A. Yes, it would be.

Q. If an application had been made for the consent of D. K. MacDonald for a waiver or extension in connection with compliance with fireproofing requirements, would a copy of that document be in the file to which you have referred?

A. Yes, it would.

Q. In order to give such a consent or waiver, state [236] whether or not D. K. MacDonald has the right to give that consent or waiver locally or whether or not they must apply to the underwriters, Lloyd's of London?

Mr. Cluck: We object to that question as calling for a legal conclusion, your Honor.

The Court: Has either one any authority on the question?

Mr. Matthews: It is a matter, your Honor, of the contract existing between D. K. MacDonald and the underwriters of Lloyd's, what they would do, whether they would have to apply to the open market at London or whether they have authority to grant it locally. It goes to the extent of authority, what they would do under the circumstances of such application.

The Court: The objection is sustained, without

(Testimony of John B. Sweet, Jr.)

prejudice to your right to ask him if there was any such authorization given here.

Q. (By Mr. Matthews): Was any such written authorization ever given? A. No.

Mr. Matthews: That is all.

Mr. Cluck: What authorization were you referring to, counsel, when you asked this last question?

Mr. Matthews: In connection with the authorization to extend or waive—you call it extension—we believe it [237] amounts to a waiver of the CAA requirements.

Mr. Cluck: Authorization by whom to whom?

Mr. Matthews: By D. K. MacDonald & Company on behalf of the underwriters of Lloyd's in connection with compliance with fireproofing requirements of the airplane to Mr. Leland, the named assured.

Cross-Examination

By Mr. Cluck:

Q. When you were asked this last question concerning authorization from D. K. MacDonald & Company to Leland and you gave the answer you did, you were referring to written authorization, were you not? A. That is right.

Q. State whether or not you know anything as to what, if any, oral authorization may have been given.

Mr. Matthews: Your Honor, the policy provides that authorization must be in writing. We therefore object.

(Testimony of John B. Sweet, Jr.)

Mr. Cluck: Which, however, can be waived by knowledge and oral acts.

Mr. Matthews: There is no allegation in the reply that any oral authorization was given; not within the issues; incompetent, irrelevant and immaterial.

Mr. Cluck: It is material on this particular issue and was covered in the opening statement of counsel.

The Court: The objection is overruled. [238]

The Witness: I know of no oral authorization.

Q. Who in the office of D. K. MacDonald & Company was handling this particular matter as far as any contacts between that office and Leland were concerned?

A. Well, both myself and Mr. Hanson, who is the head of the aviation department.

Q. It is true, isn't it, that your office utilized the services of Culliton & McDonald in respect to the servicing of this and other policies?

A. That is correct.

Q. And that the practice was for the insured to clear all such matters through Culliton & McDonald?

A. Yes.

Q. And Culliton & McDonald regularly would then communicate with you?

A. That is correct.

Q. And you in turn would clear in whatever way you saw fit with Lloyd's of London?

A. That is correct.

Q. And this was all done under the regularly

(Testimony of John B. Sweet, Jr.)

established arrangement you had with Lloyd's of London? A. That is right.

Q. State whether it isn't a fact that in this instance Mr. Leland took this particular matter up, namely, the matter of getting an extension of time from the CAA for compliance [239] with that special regulation for installation of fire-resistant materials with Mr. Culliton of Culliton & McDonald?

Mr. Matthews: Objected to, incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

The Witness: I would know nothing of that.

Q. You don't know? A. No.

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. Did Mr. Culliton or Mr. McDonald or Culliton & McDonald ever communicate with you any matters pertaining to any waiver or extension of fireproofing regulations?

A. Not that I can recall, no.

Mr. Matthews: That is all.

Recross-Examination

By Mr. Cluck:

Q. You do not deny that they did?

A. I cannot recall.

The Court: The Court would like to know if there is any business relationship between Culli-

(Testimony of John B. Sweet, Jr.)

ton & McDonald and D. K. MacDonald & Company.

Q. You stated in that connection that your firm utilized——

Mr. Matthews: Just let him answer the [240] Court's question.

The Court: I wish the proper question addressed. The Court was not framing a question.

Q. (By Mr. Cluck): You testified, as I understood it, that your firm utilized Culliton & McDonald in respect to the servicing of insurance policies which were underwritten by your firm?

A. That's right.

Q. And that the insured would transmit any information or take up any problems in connection with CAA regulations or otherwise with the office of Culliton & McDonald? A. That is correct.

Q. And then they in turn regularly would transmit such information or problem to you?

A. That's right.

Q. And then you would clear all such information and problems as you saw fit with Lloyd's of London? A. That's right.

Q. And that all that was an established practice under which your arrangements with Lloyd's of London were conducted? A. Right.

Mr. Cluck: Does that answer the question that the Court had in mind?

The Court: Yes, it does. It bears upon the question.

Q. One other question. Did any other air carriers in [241] this region subject to the same regu-

(Testimony of John B. Sweet, Jr.)

lation cause to be transmitted to your office any information or inquiry concerning this CAA regulation?

Mr. Matthews: Objected to as incompetent, irrelevant and immaterial.

Mr. Cluck: We suggest that it is material, your Honor, because this regulation on its face applies not simply to one carrier, namely, Mr. Leland, but it applies to all of them in the region, and the question is designed to a little more particularly indicate the actual practice in connection with this particular matter on the part of both D. K. MacDonald and Culliton & McDonald.

The Court: Read the question.

(Last question read by reporter.)

The Court: The objection is sustained.

Mr. Cluck: I am not sure I have in mind——

The Court: The reason is the other carriers are not shown to be related in any way to this contract of insurance, and there is no custom of such dealing pleaded as affecting the rights of the parties here and what may have been done in respect to some other insurance contract might never have been contemplated by the parties to the insurance contract here in question. That is the basis of the Court's sustaining the objection.

Mr. Cluck: The question is offered, your Honor for [242] the purpose of showing the practice of these parties in connection with the same subject.

The Court: What the practice may have been

with other parties has nothing to do with what dealings were had between the parties on the contracts in suit. The ruling will stand.

Mr. Cluck: That is all.

The Court: Step down.

Mr. Matthews: Your Honor, there are in the file the depositions of some of the Yale students who were passengers on the plane. If that deposition has not been published, the defendants at this time request it be published. We would like to inquire as to the procedure that this Court considers proper in getting the contents of those depositions into the record.

The Court: The depositions of John Kendall, Jr., George M. Cole, Donald F. Lynch, James W. Smith and Charles S. Belknap have been published. If anyone wishes these depositions considered by the fact trier in this case, the one way to get that done is for the attorney offering them to read the questions and make some arrangement for some person to read the answers.

Mr. Matthews: Would it be satisfactory with the Court if Mr. Wilkerson and I read the questions and answers?

The Court: Yes. Whoever shall read the answers may [243] take the witness stand. Do you have copies of the deposition?

Mr. Matthews: Yes, your Honor, we have a copy.

The Court: You may provide yourselves with the necessary copies. The Court will refer to the original on file.

Mr. Wilkerson: We have only one copy.

The Court: The trier of the fact, unless it be a jury, ought to have before him a copy of the paper that is being read. That is especially true with depositions. What deposition do you desire to read first?

Mr. Matthews: We are going to take first the deposition of John W. Kendall, Jr.

The Court: Is there any objection to the validity of the taking of this deposition?

Mr. Cluck: There is not, your Honor.

The Court: You may avoid all formal parts. You may proceed.

DEPOSITION OF JOHN W. KENDALL, JR.
read by counsel for defendants as follows:

“Direct Examination

“By Mr. Thompson:

“Q. Will you please state your name?

“A. John Walker Kendall, Jr.

“Q. Will you please state your temporary address and your permanent address? [244]

“A. 1845 Silliman College, New Haven, and the home address is 3207 Thirty-ninth Avenue, S.W., Seattle 6, Washington.

“Q. You are a student here at Yale?

“A. Yes.

“Q. What class? A. 1952.

“Q. How old are you?

“A. Twenty-one years old.

“Q. Were you a passenger on board a Douglas

(Deposition of John W. Kendall, Jr.)

DC-3 operated by the Seattle Air Charter that crashed following an attempted take-off from Boeing Field, Seattle, Washington, on January 2, 1949, at about 10:05 p.m., Pacific Coast Time?

"A. Yes, I was.

"Q. Previous to this attempted flight did you arrive in Seattle by this same plane from Connecticut? A. Yes, I did.

"Q. On January 2, 1949, at about what time did you arrive at the Boeing Field airport?

"A. At about six o'clock in the evening.

"Q. About what time did you first board the plane at Boeing airport?

"A. At about 8:10 p.m.

"Q. Where was it parked then?

"A. On the east side of the field. [245]

"Q. What happened after that?

"A. We taxied over to the Quonset hut, which was their maintenance shop, or so I suppose, and we got off there.

"Q. At about what time was that?

"A. That was about 8:45 p.m.

"Q. Do you know the reason why you deplaned?

"A. Yes, we deplaned to wait for the fog to lift, or the weather conditions to improve.

"Q. Did you get on board again within the next hour?

"A. Yes, I got on board about 9:40 p.m.

"Q. Previous to boarding the plane at the times you mentioned at Boeing airport, or before your trip west in the plane, did anyone actually weigh you? A. No.

(Deposition of John W. Kendall, Jr.)

“Q. Did any official or employee of the Seattle Air Charter ask you what your weight was before going on board the plane? A. No.

“Q. Of your own knowledge, do you know if any one of the passengers who was on the plane at the time it crashed was weighed by the Seattle Air Charter, the operator of the plane, before the plane was loaded either on the west-bound trip or on January 2, 1949, the date of the crash?

“A. No.

“Q. Did anyone weigh your baggage that you carried before you boarded the plane at either time mentioned above, that is, [246] on your west-bound trip or on January 2, 1949? A. No.

“Q. Mr. Kendall, have you ever been employed by an airline? A. Yes, I have.

“Q. When?

“A. I was employed by Northwest Airlines, Incorporated.

“Q. What time?

“A. The summer of 1947, the summer of 1949, and the summer of 1950.

“Q. In what capacity?

“A. I was an equipment service man who services the airplanes from the standpoint of loading and unloading baggage and cargo and gassing the airplanes and cleaning the airplanes, interior and exterior.

“Q. In the course of your duties that you performed, did you do a considerable amount of unloading of baggage and cargo?

(Deposition of John W. Kendall, Jr.)

“A. Yes, I did.

“Q. In the handling of the baggage did you become accustomed to weighing baggage and forming opinions as to the weight of baggage?

“A. I saw on the baggage tickets of individual pieces and thereby was able to learn the approximate weight of a piece of a bag, yes.

“Q. From your experience as an employee of an airline had you become accustomed to seeing baggage that is handled by [247] passengers?

“A. Would you restate that, please?

“Mr. Thompson: Will you please read it?

“(The last question was read.)

“A. (Continued): Yes.

“Q. Did you become able to judge the probable weight of bags from the sight of them?

“A. Yes, I became accustomed to judging about what amount a passenger would carry from the sight of his bags.

“Q. For example, from the size and general appearance of baggage could you form an opinion as to its probable weight without actually weighing it? A. Approximately, yes.

“Q. Are you acquainted with the weight of baggage allowance permitted each passenger?

“A. Yes, I am.

“Q. What is that weight?

“A. Forty pounds in domestic flight for scheduled airlines.

“Q. Do you know whether or not the Seattle

(Deposition of John W. Kendall, Jr.)

Air Charter provided a weight and balance form on the proposed flight on January 2, 1949?

“A. No, I do not.

“Q. Were you in a position to observe the baggage that was being carried around by passengers for the proposed flight on January 2, 1949? [248]

“A. Yes.

“Q. What did you observe in connection with the passengers' baggage, as to the weight of it?

“A. I got the definite impression that the baggage carried was excessive.

“Q. What did you observe as to the passengers' baggage as their probable weight when considered in the light of the experience you had in the airline service of handling and dealing with baggage?”

Mr. Cluck: We object to that question for the purpose of the record. The witness is trying to estimate the weight of something inside the bag on the basis of having seen other bags.

The Court: The objection is overruled. I think the objection goes to the weight of it. I have known people who could look at a hog and tell how much it weighed, pretty nearly, but I do not know so much about bags, depending on different contents. Most hogs have similar contents, but I do not know about the bags. Of course, it goes to the weight, I believe, and therefore the objection is overruled.

“A. Read that question, please?

“(The last question was read.) [249]

“A. (Continued): I would say that almost

(Deposition of John W. Kendall, Jr.)

twice as much was carried per passenger as compared to what I was used to seeing in the scheduled airline where I worked.

“Q. Would you say that a majority of the baggage of the passengers on the proposed flight of January 2, 1949, exceeded fifty pounds in weight?

“A. Yes.

“Q. Could you judge from the size and general contour of the baggage that some passengers had baggage on that proposed flight of January 2, 1949, that was probably one hundred pounds in weight—some passengers, that is?

“A. No, I don't recall of any passengers carrying that amount.

“Q. Did you see the baggage of a student by the name of James W. Smith?

“A. No, I don't recall seeing his baggage.

“Q. Did you form any opinion as to the baggage allowance or limitations of the passengers on the flight of January 2, 1949, that crashed?

“A. Yes.

“Q. What is that opinion?

“A. The opinion is that the baggage carried by the passengers was of more volume and of more weight than I had seen at the airline where I worked.

“Q. For a similar amount of passengers? [250]

“A. For a similar amount of passengers, yes.

“Q. Now, Mr. Kendall, before you boarded the plane a second time on the night of January 2, 1949,

(Deposition of John W. Kendall, Jr.)

were you in a position to observe the outside of the plane? A. Yes, I was.

“Q. Will you please tell us what you observed before going aboard the second time?

“A. I noticed that there was ice on the top surface of the wing and that that ice was approximately one-sixteenth of an inch thick, covering the surface of the wing like a sheet of glass. I noticed that the stabilizer and elevator were also covered with approximately the same amount of ice, and I moved the elevator up and down and noticed that there was a crackling of the ice. I don't mean to give the impression that the stabilizer and elevator were frozen solid together, but that there definitely was an ice coating over both of them. Also I noticed that there were bumps of ice on the under surface of the wings and ice formed between the aileron and the wing but not so that it extensively impaired the movement of the aileron, although I didn't test the mobility of the aileron.

“Q. Was there any ice near the leading edge?

“A. Of the wing?

“Q. Of the wing.

“A. I didn't notice whether there was ice there or not. [251]

“Q. Now, Mr. Kendall, as far as you know was any effort made to remove the ice from the wings or fuselage or any part of the plane after you boarded it a second time? A. No.

“Q. Did the pilot try to take off in the condition you described? A. Yes.

(Deposition of John W. Kendall, Jr.)

“Q. About how long a time elapsed between the time you boarded the plane a second time until the attempted take-off?

“A. About twenty-five minutes.

“Q. During that time, from your knowledge and experience gained in dealing with airplanes and the condition of weather that existed on that night, could the plane have accumulated more ice while taxiing into position, revving the engines, and in its wait previous to take-off? A. Yes.

“Q. How was the visibility on the night of the attempted take off?

“A. It was variable. It was rather poor.

“Q. Did you notice anything unusual about the sound of the motors as they were being warmed up prior to the attempted take-off?

“A. No, I did not.

“Q. Did they sound as if they were functioning normally? [252] A. Yes, they did.

“Q. Did you notice any unusual sound of the motors during the take-off?

“A. No, I did not up to the time the power was apparently cut.

“Q. Would you say that the passengers on the east-bound trip were carrying more baggage than they had on the west-bound trip?

“A. Yes, I believe quite a few of them had more, probably due to Christmas presents they were carrying back to school.

“Q. Were you near the plane when it was examined by Emmett Flood? A. No.

(Deposition of John W. Kendall, Jr.)

“Q. Were you there when Mr. John Vineyard examined the plane?

“A. I don’t know the man.

“Mr. Thompson: I think that is all.

“/s/ I have read my statement and it is correct.

“JOHN W. KENDALL, JR.”

Mr. Matthews: I would now like to read the deposition of George M. Cole.

The Court: Do you wish to offer this Kendall deposition as a part of defendants’ case in chief?

Mr. Matthews: Yes, Your Honor. [253]

The Court: It is so received.

DEPOSITION OF GEORGE M. COLE

“Direct Examination

“By Mr. Thompson:

“Q. Will you please state your name?

“A. George Marion Cole.

“Q. Let us have your temporary address and permanent address?

“A. Temporary address 601 Berkely College, Yale University, and permanent address 6516 Seventeenth Avenue, N.W., Seattle, Washington.

“Q. In what class are you here at Yale?

“A. I am a senior, class of 1951.

“Q. How old are you?

“A. Twenty-three years old.

“Q. Were you a passenger on board the Douglas

(Deposition of George M. Cole.)

DC-3 that crashed at Boeing Field at about 10:05 p.m., Pacific Time, on January 2, 1949?

"A. I was.

"Q. Had you come on that same plane from Connecticut on the west-bound trip?

"A. I did.

"Q. At about what time did you arrive at Boeing Field on January 2, 1949?

"A. Approximately at six o'clock.

"Q. Tell us what happened in the matter of planing and deplaning at the airport. [254]

"A. It was around 8:10 before we boarded the plane the first time. The plane then taxied to one end of the field, where we waited a few more minutes, and we finally deplaned there at about 8:45, went into the maintenance shack, and were in there for sometime, and finally got back on the plane at approximately 9:40.

"Q. Previous to going on the plane the second time on January 2, 1949, and previous to boarding it on the western trip, did anyone weigh you?

"A. No, sir, they did not.

"Q. Did any official or employee of the Seattle Air Charter ask you what your weight was before you boarded the plane on either of the above occasions? A. No, sir, they did not.

"Q. Do you know whether any one of the passengers on either voyage was weighed by anyone before they boarded the plane?

"A. No, sir, I don't think so.

(Deposition of George M. Cole.)

“Q. Did anyone weigh your baggage that you carried before you boarded the plane at either time?

“A. No, sir.

“Q. Did you have anything to do with the baggage that was loaded on the plane on January 2, 1949? A. Yes, sir, I did.

“Q. What was it? What did you do? [255]

“A. I was on the ground lifting the bags up to the door to Jack Roderick.

“Q. Was anyone else with you at the time?

“A. I believe there was one other man helping, yes.

“Q. Could it have been Mr. James Smith?

“A. Yes.

“Q. Now, Mr. Cole, in the lifting of the baggage and in the process of loading the plane, were you able to judge the approximate weight of the bags and baggage as it was being loaded?

“A. I can only say in regard to that question, sir, the amount of baggage that I loaded seemed to be excessive of the forty pounds we were supposed to have per person.

“Q. From your recollection of the loading would you say that there were many pieces of baggage that weighed well over fifty pounds?

“A. I would say there were a number of bags that weighed fifty or over.

“Q. Now, Mr. Cole, before you boarded the plane a second time on the night of January 2, 1949, did you observe the outside of the plane?

“A. Yes, sir.

(Deposition of George M. Cole.)

“Q. Will you tell us what you observed before you went aboard and the plane attempted to take off?

“A. I walked over to the trailing edge of the wing prior [256] to getting on a second time and ran my hand over the top trailing edge of the wing, and the ice I would judge by feeling and looking at it was around one-sixteenth of an inch thick.

“Q. Did you observe the underside of the wing and other parts of the plane? A. No, sir.

“Q. Do you feel reasonably sure that the plane took off in a condition with the ice on the parts of the plane as you have stated? A. Yes.

“Q. Were you present when they used the solution on the plane in an effort to remove the ice?

“A. Yes, sir, we watched them apply the alcohol compound from inside the plane for a few minutes.

“Q. Did this condition that you previously described exist after they had applied the alcohol solution? A. Yes, sir.

“Q. Were you present when they played a hose on the plane, trying to remove the ice?

“A. I can't remember that, sir.

“Q. Were you present at the time when the pilot, Emmett Flood, examined the plane and refused to fly it? A. No, sir.

“Q. Were you present when John Vineyard examined the plane? [257] A. No, sir.

“Q. Did you see any ice on the windows of the plane?

(Deposition of John W. Kendall, Jr.)

“A. There was ice on some windows, sir, as I remember.

“Q. How was the visibility that night?

“A. It was variable. The fog rolled in in banks and then rolled away in banks.

“Q. What was the condition of the surface of the airport?

“A. The landing field itself was covered with ice, as I remember—quite icy.

“Mr. Thompson: I think that is all.

“/s/ I have read my statement and it is correct.

“GEORGE MARION COLE.”

Mr. Matthews: I would like to offer that deposition in evidence.

The Court: It is received in evidence as a part of the defendants' case in chief. At this time we will take about a ten minute recess.

(Recess.)

The Court: You may proceed in the case on trial.

Mr. Matthews: At this time the defendants would like to read into evidence the testimony of Donald F. Lynch.

DEPOSITION OF DONALD F. LYNCH

“Direct Examination

“By Mr. Thompson:

“Q. Please state your name? [258]

“A. Donald Francis Lynch.

“Q. Please tell us your temporary address as well as your permanent address.

“A. My temporary address is 930 Saybrook College, New Haven, Connecticut, and my permanent address is 2916 Beacon Avenue, Seattle 44.

“Q. Are you a student here at Yale?

“A. Yes.

“Q. What class? A. 1952.

“Q. How old are you? A. Nineteen, sir.

“Q. Were you a passenger on board the Douglas DC-3 that crashed at Boeing Field on January 2, 1949, at about 10:05 p.m., Pacific Coast Time?

“A. Yes, sir, I was.

“Q. Had you taken this same plane on the western flight to Seattle? A. Yes, sir.

“Q. About what time did you arrive at Boeing Field on January 2, 1949?

“A. We arrived there about 7:30 in the evening.

“Q. At about what time did you first go aboard the plane? A. At about 8:10.

“Q. What happened after that? [259]

“A. We taxied across the field to a Quonset hut. There we disembarked and waited in the Quonset hut.

“Q. Did you again go aboard the plane?

(Deposition of Donald F. Lynch.)

“A. Yes, sir, I went aboard the plane again at about 9:40.

“Q. Did you see the baggage being loaded?

“A. I saw part of it being loaded.

“Q. Previous to boarding the plane at the times you have mentioned at Boeing airport and before your trip west in the plane, did anyone weigh you?

“A. No, sir, I was not weighed.

“Q. Did any official or employee of the Seattle Air Charter, or anyone else, ask you before you boarded the plane on either the western flight or the attempted flight on January 2, 1949, what your weight was?

“A. I was not asked on either flight before I entered the plane.

“Q. Do you know if any one of the passengers on either the western flight or the contemplated flight of January 2, 1949, was weighed or asked their weight before they boarded the plane?

“A. I have heard of no one who was asked his weight before boarding the plane.

“Q. Did anyone weigh your baggage that you carried before you boarded the plane on either time?

“A. No, sir. [260]

“Q. Mr. Lynch, did you observe carts on which the baggage was piled?

“A. Yes, sir, I did. I loaded my bag on one of the carts.

“Q. Did you see passengers carrying around their baggage previous to the baggage being placed on the carts?

(Deposition of Donald F. Lynch.)

“A. Yes, sir, I saw some boys carrying baggage.

“Q. In some instances did you notice the size of the baggage or suitcases they were carrying?

“A. I noticed that James Smith had two large bags, and I believe that Roger Young had a large bag.

“Q. From your general experience in carrying suitcases and judging weights, can you tell us what the approximate weights of the baggage of those two persons you mentioned probably were?

“A. I would estimate both of them at eighty pounds or more.

“Q. Will you please inform us what was the result of the observations you made in connection with the baggage that was loaded on that plane on the night of January 2, 1949?

“A. It is my opinion, sir, that most every student on that plane carried more than the required forty pounds of baggage.

“Q. Now, Mr. Lynch, before you boarded the plane a second time on January 2, 1949, did you observe the outside of the plane?

“A. Yes, sir, I did.

“Q. Will you tell us what you saw? [261]

“A. I noticed that there was ice on the fuselage, that there was bumps of ice on the underside of the left front wing, and that there was a sheet of ice on the top of the left front wing, and that the de-icers were covered with a thin sheet of ice.

“Q. Did you make any observations in connection with the windows of the plane?

(Deposition of Donald F. Lynch.)

"A. It was impossible to see out of the windows.

"Q. Why?

"A. They were iced up on the outside and of course fogged up on the inside.

"Q. Did you know of or watch or have knowledge in any way of the attempt to remove ice from the wings?

"A. Alcohol was swabbed on the wings, and I believe also on the tail surfaces, with a mop.

"Q. Now, Mr. Lynch, was the condition you described the plane was in a moment ago when you boarded it for the second time the condition that existed after they had swabbed the wings, and so forth, with alcohol?

"A. Yes, sir, that was the condition that I saw after the wings were swabbed.

"Q. And was that the condition in which the attempted take-off was made?

"A. Yes, sir, it was.

"Q. How was the visibility on the night of the attempted [262] take-off?

"A. Visibility varied. Boeing Field is in a hollow and the fog comes and goes with the winds. At the moment we loaded the plane for a second time the visibility was excellent and I could see the top of Beacon Hill. As we taxied off for the take-off a fog seemed to cover the field more and more and the visibility did not seem to me to be good at the time of take-off.

"Q. Were you present at the time they played a hose on the plane, trying to remove the ice?

(Deposition of Donald F. Lynch.)

“A. No, sir, I was not.

“Q. Were you present at the time when Emmett Flood examined the plane and refused to fly it?

“A. No, sir, I was not.

“Q. Do you know whether or not there is in existence a weight and balance form?

“A. I have heard that a balance form was made out in the office of the Air Charter Service, but I didn't see it.

“Q. Have you a sister by the name of Audry Lynch? A. Yes, sir, I have.

“Q. Where does she live in Seattle?

“A. Her permanent address is 2916 Beacon Avenue, Seattle 44.

“Q. Where is she at the present time?

“A. In Washington State College, Pullman, Washington.

“Q. What seat did you occupy on the night of January 2, [263] 1949, at the time of the crash?

“A. I occupied the last seat in the second column of seats on the right side of the airplane, facing towards the nose.

“Q. Was the plane fully loaded at that time?

“A. Do you mean at the take-off?

“Q. Yes, at the time of the take-off.

“A. Had they put all the baggage in?

“Q. I am more after the passengers.

“A. Oh, there was one passenger who wasn't there. Altogether I think there were twenty-seven of us. There should have been twenty-eight.

(Deposition of Donald F. Lynch.)

“Q. In the compartment of the plane, aside from the cargo space did the passengers have other packages and baggage?

“A. Yes, sir. Practically everyone carried small packages.

“Q. Did you notice anything unusual about the sound of the motors as they were being warmed up prior to the attempted take-off?

“A. No, sir, I did not.

“Mr. Thompson: I think that is all.

“/s/ I have read the statement, and it is correct.

“DONALD F. LYNCH.”

Mr. Matthews: I offer that deposition in evidence.

The Court: It is received as a part of defendants' case in chief. [264]

Mr. Matthews: At this time we would like to read the deposition of James Wendell Smith.

DEPOSITION OF JAMES WENDELL SMITH

“Direct Examination

“By Mr. Thompson:

“Q. Will you state your full name?

“A. James Wendell Smith.

“Q. Will you please let us have your temporary address and also your permanent address?

“A. My college address at the present time is 1287 Yale Station, New Haven, Connecticut. My

(Deposition of James Wendell Smith.)

permanent address is 1213 Spur Street, Aberdeen, Washington.

“Q. You are a student at Yale, and in what class?

“A. I am a full-time student at Yale University and a junior-elect.

“Q. How old are you?

“A. My age is twenty.

“Q. Were you a passenger on board the Douglas DC-3 on the night of January 2, 1949, when it attempted a take-off at Boeing Field?

“A. I was.

“Q. Previous to this attempted flight did you arrive in Seattle by the same plane from Connecticut? A. Yes.

“Q. At about what time did you arrive at Boeing Field on the night of January 2, 1949? [265]

“A. Five-thirty.

“Q. While you were out there did you see other passengers and their baggage previous to going aboard the plane? A. I did.

“Q. How many times did you board that plane that night? A. Twice.

“Q. Do you remember approximately the time you boarded the plane for the second time?

“A. I believe it was somewhere around 10:10. I am not sure.

“Q. Would it help your recollection in this matter if I told you that the crash took place about 10:05? A. Yes, it would.

(Deposition of James Wendell Smith.)

“Q. About what time then, do you think you went aboard the plane? A. Nine-forty.

“Q. Now, previous to boarding the plane at the times you have mentioned, that is, both at Boeing Field as well as on your trip west in the plane, did anyone weigh you?

“A. Baggage or the person?

“Q. Person. A. Nobody weighed anybody.

“Q. In other words, no one on the plane was weighed at any time?

“A. No. Well, I mean——

“Q. As far as you know. [266]

“A. I don't want to confuse you with my “No.” I mean there was nobody weighed.

“Q. Did any employee or official of the Seattle Air Charter ask you what your weight was before you went aboard either on your western trip or on the night of the attempted flight before?

“A. No.

“Q. Did anyone weigh your baggage that you carried before you boarded the plane at either time, that is, on the night of January 2, 1949, or on your flight westward? A. No.

“Q. Did you see the baggage of anyone being weighed? A. No, I did not.

“Q. Were you in a position to see the baggage that was being loaded on the plane on the night of January 2, 1949? A. I certainly was.

“Q. How did you come to be in a position to see the baggage?

(Deposition of James Wendell Smith.)

“A. Because I was one of the persons who helped load the baggage on the plane.

“Q. You actually handled the baggage?

“A. I actually handled the baggage.

“Q. From your actual handling of the baggage are you in a position to tell us the probable weight of baggage that was carried by the majority of the students in terms of whether or not the baggage weighed over forty pounds? [267]

“A. The baggage weighed well over forty pounds. I should say the average weight of each person's baggage was sixty pounds. My own baggage weighed up to a hundred pounds. Some had less, but the average was sixty to sixty-five pounds. May I tell you where they put it in the plane?

“Q. Yes.

“A. They filled up completely a baggage compartment and then they had to throw the bags in the back part of the plane until that was completely filled up, and then they went up in the pilot's compartment and put more baggage there.

“Q. Besides all this baggage did the students have additional baggage or cargo as they sat in the plane?

“A. Yes, such things as briefcases and small boxes were accompanied by the students.

“Q. Mr. Smith, you have had some flying experience, have you not? A. Yes, I have.

“Q. State generally what it has been.

“A. I have never actually flown a plane yet. I

(Deposition of James Wendell Smith.)

went on one transcontinental trip both ways by air on a DC-4.

“Q. Now, Mr. Smith, before you boarded the plane a second time on the night of January 2, 1949, were you in a position to observe the outside of the plane? A. I was.

“Q. Will you tell us, please, what you observed before [268] going aboard?

“A. The plane was covered with a thin sheet of ice. On the aileron there were pieces of ice hanging. Below the wings there were also pieces of ice hanging. The windows were completely encrusted with a sheet of ice, so that when a person got in the plane they couldn't see out.

“Q. Did you notice whether there were patches of ice on the wings?

“A. I don't know what you mean by patches.

“Q. Blotches of ice.

“A. No, sir, I don't remember any particular patches, though I do remember this thin sheet of ice and also the ice hanging down from the aileron.

“Q. Was some of the ice behind the leading edge, that is, the front edge? A. Yes.

“Q. Did you have a chap near you at the time you were looking at the plane and observing its condition? A. I did.

“Q. What was his name?

“A. Mr. Charles Belknap.

“Q. Did you observe him do anything in particular?

(Deposition of James Wendell Smith.)

“A. Well, he chipped off a piece of the ice that was hanging down from the wing.

“Q. Mr. Smith, as far as you know, was any effort made to [269] remove any of the ice or the icy condition from the wings or any part of the plane?

“A. Yes, there was. There were some meager attempts.

“Q. When was this done in respect to the time when you boarded for the second time?

“A. Before we boarded the plane.

“Q. So was the condition that you state as existing at the time you went aboard for the second time the condition in which the plane attempted to take off? A. It was.

“Q. Mr. Smith, did you notice the condition of the land on which the plane would run, known as the runway? A. Yes, I did.

“Q. Will you tell us what you observed?

“A. It was covered with a very thin layer of ice so that it made walking difficult.

“Q. Will you please advise us whether you made any observations as to visibility on the night of the attempted take-off? A. Very much so.

“Q. Will you tell us what you observed?

“A. It was an extremely cold evening. Undoubtedly it was clear, but above this fog that was continually swirling in and out of the field. There was hesitation to take off because of this fog, but they saw it lift for a minute just before we boarded for a second time and thus they thought they [270]

(Deposition of James Wendell Smith.)

had the opportunity to take off. But once we got on the plane the fog started moving in again. Consequently there was some delay at the end of the runway, waiting for another break.

“Q. On the trip westward can you tell us as to the number of times they put in gas and the stops they made and any observations you made in connection with the load?

“A. There was so much baggage and so much weight on the plane that they couldn't put in the amount of gasoline that the plane could ordinarily carry. Consequently they first stopped at Cleveland, then Chicago, Minneapolis, Fargo, Billings, Spokane, and landing at Spokane was an emergency landing.

“Q. Would you say the load that they had on the night of the attempted take-off was greater than the load that they had on the west-bound flight? A. Curiously, it was.

“Mr. Thompson: I think that is all.

“/s/ I have read this statement and it is correct.

“JAMES W. SMITH.”

Mr. Matthews: I offer that deposition in evidence.

The Court: It is received in evidence as a part of the defendants' case in chief.

Mr. Matthews: I would now like to read the deposition of Charles Sabin Belknap. [271]

DEPOSITION OF
CHARLES SABIN BELKNAP

“Direct Examination

“By Mr. Thompson:

“Q. Will you state your name for the record, please? A. Charles Sabin Belknap.

“Q. Where are you residing at Yale College at the present time? A. 419 Calhoun.

“Q. Where is your home?

“A. Portland, Oregon.

“Q. What is the address there?

“A. 2501 S. W. Ravensview Drive.

“Q. What class are you in at Yale?

“A. 1952.

“Q. What is your age? A. Nineteen.

“Q. Were you a passenger on board a DC-3 airplane operated by the Seattle Air Charter that made an attempt to take off from Boeing Field on January 2, 1949, and that crashed at about 10:10 p.m., Pacific Coast Time? A. Yes.

“Q. Previous to the attempted flight, at what time did you arrive at the Boeing air field?

“A. I believe it was——

“Q. Roughly.

“A. Roughly, I would say 8; maybe an hour either way.

“Q. Previous to this attempted flight did you arrive in [272] this plane at Seattle from Connecticut? A. Yes, I believe it was the same.

“Q. How many times did you board the plane on the night of January 2, 1949? A. Twice.

(Deposition of Charles Sabin Belknap.)

“Q. The second time you boarded the plane where was it parked?

“A. It was away from where we had begun, about several hundred yards, I guess—some shack.

“Q. Previous to boarding the plane on the night of January 2, 1949, did anyone weigh you?

“A. My baggage?

“Q. No, you personally. A. No.

“Q. Did anyone weigh your baggage?

“A. No.

“Q. Do you know a student by the name of James W. Smith? A. Yes.

“Q. From your observation of the baggage he carried could you tell us about how much it weighed approximately? A. I am not qualified to say.

“Q. Would you say that it exceeded sixty pounds? A. I didn't notice his baggage.

“Q. Before you entered the plane the second time did you make any observations of the outside condition of the plane?

“A. I ran my hand along the aileron of the left wing and [273] there was some ice, sort of like formation of icicles beginning, and I chipped a little off.

“Q. You chipped a little off?

“A. Yes. It wasn't a uniform layer necessarily, but there was a patch—intermittently there were chunks of ice and stuff.

“Q. Were there chunks or patches of ice on the wings? A. Yes.

“Q. Did some of this ice also remain on the

(Deposition of Charles Sabin Belknap.)

plane immediately behind the leading edge, that is, the front edge? A. Yes.

“Q. Do you remember the condition of the windows on the plane?

“A. I can't say for sure. I wasn't sitting by a window; I was sitting on the aisle.

“Q. As far as you know, did the plane take off in the condition you have described? A. Yes.

“Q. Did you notice anything unusual about the sound of the motors as they were being warmed up or during the time of take-off?

“A. No. I know they were constantly revved up; that is all I know.

“Q. Were you present at the time that Emmett Flood, the pilot, examined the plane?

“A. No. [274]

“Q. Did I understand you to say, Mr. Belknap, that you actually broke a piece of ice off the plane?

“A. Yes.

“Q. Have you any opinion as to the question of overload of either passengers or baggage on the night of January 2, 1949? A. I guess no.

“Mr. Thompson: I think that will be all.

“/s/ I have read my statement and it is correct.

“CHARLES SABIN
BELKNAP.”

Mr. Matthews: Defendants would like to offer that deposition in evidence.

The Court: It is admitted as part of defendants' case in chief.

Mr. Matthews: I understand we may omit reading the certificate.

The Court: Yes, unless there is objection to the legality of taking of the deposition. I hear no objection.

Mr. Wilkerson: At this time, your Honor, I would like to offer in evidence Defendant's Exhibit A-2, which was marked and which consists of the telegram concerning the weight of Robert R. Adams and the records of Yale University concerning the weights of the other Yale students. We have now the black on white photostats of the records. We offer them pursuant to the stipulation [275] made.

Mr. Cluck: We make objection to their admission, except as to Mr. Adams. I think we agreed that wire could be admitted stating his weight.

The Court: The Court wishes the record to show that the defendants now offer another photostatic copy in proper form of certain documents previously in the trial marked as Defendant's Exhibit A-2 and later withdrawn, and defendant now wishes those photostatic copies marked Defendant's Exhibit A-2 and now offers them in evidence. Is there any objection?

Mr. Cluck: Yes, your Honor, there is objection. The stipulation to which counsel referred is confined solely to the matter of certification, reading as follows: "Copies of any records of Yale University or any of its departments, certified to be true copies of such records by any person who certifies that he has custody or possession thereof, shall be admissible in evidence in this cause to the same extent

as, but no greater extent than, the original records would be if the official custodian thereof produced them in open court and testified to their genuineness."

We have been careful on all of our dealings to make it clear that we were going to call for proper showing of proof on all relevant matters except those [276] clearly set forth in the stipulation, and on this particular matter it is our contention that these form sheets are not admissible.

The certificate attached to the set of sheets states as follows: "To Whom It May Concern: This is to certify that I, Orville F. Rogers, M.D., am Director of the Department of University Health, Yale University, and custodian of the records of the said Department.

"The accompanying photostats are true copies of the records of the Department of University Health.

"The originals of these records are on file in my custody at Yale University.

"/s/ ORVILLE F. ROGERS, M.D.,
"Director."

It is our position that there must be a showing to come within even the most liberal provisions of the Federal statute, that those are business records and that he regularly keeps them and that the other requirements of the statute are satisfied. Moreover, the records themselves, which, by the way, consist of a series of weights, do not set forth the ticket weight or the manner in which it was taken or whether any weight was taken at all. What it does

set forth is the date of examination, whenever that was. Further than that, the dates of examination, in the majority, or almost a majority of the cases, are either a substantial time [277] before or a substantial time after the date of the accident. I made a short tabulation of them here, and the period varies from some months to as much as two years and over, so that the matter of the bearing of the entry upon the weights of the students in this airplane as of January 2, 1949, is open to grave doubt.

The Court: I should think if there were weights that were taken at the beginning of the school term or at some time that is related to the business of the students in connection with which these flights were taken, that that last objection would be met. Is there any showing or any admitted fact relating to that?

Mr. Cluck: There isn't even a showing, your Honor, with any scaling at all. The only entry that would be offered to imply that is the entry date of examination, weight, which may have either been gained from the statement of the student or from the scaling. We do not know.

The Court: Of course, a business record that is used for the purpose of business, no matter whether the manner in which the record information was obtained is accurate or not, would be the test on that point of the shop book rule, I would think. If the business relied upon the information in order to serve a part of the business purposes, then the question of how information or [278] how accurately the information may have been assembled would not

be a question which would be so vital. The main concern I have about this offer is whether or not it has been proved to be business information of Yale University, and whether it was utilized by the University at a period of time that is material to the time involved in the litigation. I will hear Mr. Wilkerson further on that.

Mr. Wilkerson: The exhibits, of course, themselves show the date of the examination and the name and age of the student. They also show that they contain confidential information not relevant to the question of age and weight, and show that the record is on a form of Yale University Department of Health, and also contain something at the bottom, some information concerning apparently the dental records which are not contained in the record offered.

Of course, the stipulation states that the records are genuine. It seems to me that that meets—the matters that counsel has raised go to the weight of the evidence rather than to the admissibility. The custodian has certified that they are copies of records of the Department of Health, Yale University, and part of the official records of Yale University concerning these students, that they are in his possession. [279]

Mr. Cluck: Would you indicate to the Court, counsel, the dates on some of those examinations? I think the Court inquired about that.

Mr. Wilkerson: The Court has them before him.

The Court: One examination is dated August 13, 1945, or 1946, I cannot tell for sure. It is relating

to Nilsen. For Smith, the date is November 29, I believe it is 1949. The rubber stamp that was used is blurred or blotted out. There is another one relating to Schaak, which I cannot make out as to the year.

There is one as to Thompson, dated March 9, 1950. There is one as to Roderick, September 2, 1946, I believe. William Hood Howe, as of February 20, 1950. There is another one here with a name I cannot make out very plainly, it may be Kinall, and the date is February, 1950. Then there is Anderson, October 4, 1950, and some other person's name, October 11, 194...—I cannot make out the figure which is most important.

Garrett, April 2, 1948, according to my ability to see. Another one relates to Bjork as of September 30, 1948; another as to Liddle, October 14, 1948; another one as to another person, November 16, 1948. Another as to G. M. Cole, September 18, 1947. I should think the time in so many of the instances is so remote from this, and being weights of young persons of school age, it [280] would be very unreliable.

Mr. Wilkerson: If your Honor please, they were young persons of school age and presumably would be growing, some of them, at the ages shown, which of course would indicate that. It seems to me that that matter goes, of course, to the weight that your Honor would give. It seems to me the period is close enough that it should be admissible, especially in view of the fact that the age is given, would indicate the reliability of it as to date.

The Court: Has anyone any authority that you

want to call to the Court's attention? So far as I know, there is no proof by any witness that there is no other source of information about the weight; so far as the record shows, it may have been possible to call the mother or father of the decedent passengers, and it may have been possible to have called the surviving passengers as witnesses to develop what their weight was at the time in question; no record showing that this is the only possible information upon the subject of weight.

Mr. Wilkerson: From the nature of the crash, of course, that number of students, it would appear, I think, at least difficult to obtain from the facts shown the weight of that many people.

The Court: I think on the record the Court ought to sustain the objection. The objection is sustained to [281] this offer.

Mr. Matthews: I believe your Honor reserved ruling on the admissibility of Defendant's Exhibit A-13, which is the copy of the findings of the CAB, which we offer pursuant to that section of the statute which provides that such findings and reports—that the official publications of such findings and reports shall be admitted as competent evidence in any court in the United States.

Mr. Cluck: If the Court please, there is an exhaustive annotation on this subject, 153 A.L.R. 163. The title of the annotation is: "Admissibility of report of public officer or employee on cause of or responsibility for injury to person or damage to property."

The general rule, as stated in A.L.R., is as follows: "Notwithstanding the general rule that public records and reports are admissible in evidence, the courts almost universally exclude statements contained in such reports or records concerning the cause of or responsibility for an injury to the person or damage to property."

At page 170 of the annotation, there is a subdivision c. entitled "Statutes held not to make report admissible," in which statutes in some respects similar to the one under review are considered. I found that other cases that we had collected are included in that annotation, [282] and the summary is made in such an able fashion that it is the best brief, it seems to me, on the subject that could be offered for these purposes.

Mr. Wilkerson: I am familiar with the annotation in question cited by counsel. There is another Federal statute in addition to the two which the annotation considers, which have already been called to your Honor's attention. It considers 28 U.S.C.A. Sec. 1733, which reads as follows: "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

"(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

A report of the findings in a case in the Federal Court in Louisiana is cited in the annotation. The report of findings in a marine case under similar circumstances, was held to be admissible. I think the annotation does cover the subject matter thoroughly, but under clear reading of 49 U.S.C.A. 425, I believe this exhibit is admissible.

The Court: Will you consider the provisions of that [283] section, subparagraph (d) on page 269 of the pocket part and see what if anything you have to say, Mr. Cluck, and see what you think of the provisions as being applicable to the offer of A-13.

Mr. Cluck: The last two sentences of subdivision (d), page 269, are probably what the Court is particularly referring to. The first sentence of the section required that the Board make a report of all proceedings and investigations in which formal hearings were held, stating conclusions and decision and order.

The second sentence is: "All such reports shall be entered of record and a copy thereof shall be furnished to all parties to the proceeding or investigation." It goes on to say: "The Board shall provide for the publication of such reports, and all other reports, orders, decisions, rules, and regulations issued by it under this chapter in such form and manner as may be best adapted for public information and use. Publications purporting to be published by the Board shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Board therein contained in all courts

of the United States, and of the several States, Territories, and possessions thereof, and the District of Columbia, without further proof or authentication thereof.”

We submit that relates solely to the manner of proof [284] or authentication in those instances where the report of the Board might be usable for any purpose, and that this provision must be construed with Section 581, in express terms providing that no part of any such matter relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

In other words, the two sections are not inconsistent in any respect, as seems to have been implied in some remark made by counsel yesterday. One just relates to the general manner of proof and authentication, 425, and the second contains the express prohibition against its use in any action for damages growing out of any matter mentioned in the report or reports.

The Court: Does anyone else connected with the trial wish to make any comment upon this matter? Mr. Wilkerson, do opposing counsel's last remarks cause you to feel the need of any further statement from you?

Mr. Wilkerson: I think the statements are so contrary to the plain wording of the statute, I do not see how you can arrive at the conclusion that counsel reaches from that section. It says: “Pub-

lications purporting to be published by the Board shall be competent evidence of the orders, decisions, rules, regulations, and reports [285] of the Board therein contained in all courts of the United States, and of the several States, Territories, and possessions thereof, and the District of Columbia, without further proof or authentication thereof."

It seems to me that the section clearly authorizes the admission in evidence.

Mr. Cluck: The only reply I would respectfully offer is this, your Honor, that implied in that statute which counsel read is the point that no proof or authentication is required in any court of the United States, any court mentioned, as to any action or as to any purpose for which the report is otherwise admissible but that must be then construed to be said in connection with Section 581, which states expressly where they are not admissible. It seems to me we fall back on the rather well-established rule of statutory construction that courts will make an effort to harmonize sections of applicable statutes in such way as to give effect to them all; and this is just one of those instances where in one section the intention of the framers was devoted to the matter of proof and authentication and the other was dealing with the other matter of stating expressly in what actions the report shall not be admissible at all, however proved or authenticated.

The Court: This question has not given me as much [286] trouble as my present inquiries and indulgence of your expression of your views may seem

to you to indicate. It seems clear to me that the provisions of Sec. 425, Title 49, and particularly subparagraph (d), relate to the method of promulgation and authentication. The effect of such provisions is, in my opinion, to say what is necessary for the Board to do in order to effectuate the making or promulgation of the reports, orders, decisions, rules and regulations issued by the Board, and to officialize a certain type of authentication thereof, and the effect of such section, and in particular subsection (d), and the effect of such provisions is that if the Board does publish any such report, order, decision, rule or regulation in the manner therein described, that thereafter such things published in the manner therein provided shall be deemed as officially authenticated without further proof, without looking further than to that publication which is here provided.

It seems to me to not conflict at all with the specific provision of Section 581, which says expressly that “. . . no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned [287] in such report or reports.”

The last statutory provision read by the Court from Sec. 581 expressly forbids the admission in evidence of Defendant's Exhibit A-13, in the Court's opinion, and the Court does sustain the objection to

the offer and that exhibit is excluded from the evidence.

Is there any other exhibit to which defendants' counsel wish to call attention? I believe there was Defendant's Exhibit A-14, which was the flight plan which concerned the entry of "0600."

Mr. Wilkerson: We would like to offer that at this time, your Honor.

Mr. Cluck: No objection, your Honor.

The Court: That is now admitted.

(Defendant's Exhibit A-14 received in evidence.)

RECEIVED

AIRC-57

TWR RH RB

JAN 3 03 00 49

US ARMY COMM STN SEATTLE, WASH.

FLIGHT PLAN

C O P Y

Received RB Jan 3 02 57²49

US ARMY COMM STN SEATTLE, WASH.

AIRCRAFT IDENTIFICATION NO. **Z**

COLOR OF AIRCRAFT

79025

Silver

DC-3

NAME OF PILOT OR FLIGHT COMMANDER

PILOT'S OR FLIGHT COMMANDER'S ADDRESS

CERTIFICATE NO. OF PILOT OR
FLIGHT COMMANDER

Chavers

Des Moines 444Z

12473

POINT OF DEPARTURE

CRUISING ALTITUDE(S) AND ROUTE TO BE FOLLOWED

SEA

9000 Ga to Elm 11, 70 RAB to IWA 9000 Ga BIL.

POINT OF FIRST INTENDED LANDING (VFR)

OR INTERMEDIATE STOPS AND DESTINATION (VFR)

PROPOSED TRUE AIR
SPEED AT CRUISING ALT.PROPOSED TIME OF
DEPARTUREACTUAL TIME OF
DEPARTURE

BIL

165

M. P. H.

P 2100P

D

ESTIMATED ELAPSED TIME UNTIL ARRIVAL
OVER POINT OF FIRST INTENDED LANDING
OR FINAL DESTINATION

ALTERNATE AIRPORT

FUEL ON BOARD

FREQUENCY OF RADIO EQUIPMENT

4 plus 15

HLM

06:00

RECEIVER

TRANSMITTER

3105.6210

ANY OTHER INFORMATION PERTINENT TO AIR TRAFFIC CONTROL OR SEARCH AND RESCUE

ARRIVED

FILED BY

LOCATION

TIME

Chavers

Mr. Wilkerson: At this time I would like to re-offer Defendant's Exhibit A-4, which was the report on the engines which Mr. Davison stated, as I recall his testimony, was his original notes or a copy of his original notes taken at the time he examined the engines.

The Court: Did he make any statement as to whether or not this went forward into the Board's report on this investigation?

Mr. Wilkerson: It is my recollection he testified he [288] did make a report to the Board.

The Court: And that these were made for the Board's attention in connection with the inspection that he was making for the Board?

Mr. Wilkerson: He testified, however, that it was a part of his original findings, a part of the records of his firm in that connection.

Mr. Cluck: Your Honor, if it will expedite matters, we will withdraw our objection to that exhibit, provided it is distinctly understood that it is submitted solely as the witness' own work and has nothing whatever to do with any Board finding or proceeding.

Mr. Wilkerson: It was my understanding of his testimony that it was his own work.

The Court: Upon that understanding, it is now admitted.

(Defendant's Exhibit A-4 received in evidence.)

DEFENDANTS' EXHIBIT A-4

Right Engine

R1830-90D P & W

Serial Number missing

External Visual Inspection

1. Front case broken completely off just ahead of attaching studs.
2. Front oil pump still in place on engine.
3. Anchor plate (Reduction drive gear bearing support plate) bent back between No. 4 and No. 6 cylinders.
4. Oil line from front case to rocker sump missing.
5. Oil scavenge line from front case to blower case still attached to pump.
6. Harness manifold bent and twisted but still attached to front of crankcase.
7. Ignition leads torn loose from ignition manifold on lower left side of engine.
8. All ignition harness lead attaching nuts burned away from manifold.
9. No. 1 cylinder:
 - Intake and exhaust pipes attached.
 - Cylinder intact.
 - Push rods in place but covers burned near centers.
 - Spark plug leads attached.

Defendants' Exhibit A-4—(Continued)

No. 2 cylinder:

Intake and exhaust pipes attached.

Cylinder intact.

Exhaust push rod housing half burned away.

Intake push rod housing intact.

Spark plug leads attached.

No. 3 cylinder:

Intake and exhaust pipes attached.

Cylinder intact.

Exhaust push rod housing intact.

Intake push rod housing half burned away.

Spark plug leads attached.

No. 4 cylinder:

Intake and exhaust pipes attached.

Exhaust push rod housing $\frac{1}{3}$ burned away.

Intake push rod housing burned away except for approximately 3" from crank-case.

Intake rocker box and cover mashed and partially burned.

Spark plug leads attached.

No. 5 cylinder:

Exhaust pipe missing except for short stack still attached to cylinder.

Intake pipe in place but coupling nut burned away.

Rear spark plug lead hanging by ignition wire.

Defendants' Exhibit A-4—(Continued)

Front spark plug lead in place except aluminum attaching nut burned away.

Exhaust rocker cover partially burned.

Intake rocker box broken off and burned.

Push rods and housing burned away except for $\frac{1}{3}$ of each still attached to crankcase.

No. 6 cylinder:

Exhaust pipe missing except for short stack still attached to cylinder.

Intake pipe in place but coupling nut burned away.

Intake and exhaust rocker boxes broken and burned off. Valves, locks and springs still in place.

Push rods and housings burned away.

Spark plug leads hanging by wires.

No. 7 cylinder:

Exhaust pipe in place.

Intake pipe in place but coupling nut burned away.

Intake and exhaust rocker boxes burned off.
Valve assemblies in place.

Exhaust push rod and housing burned away except for $\frac{1}{3}$ still attached to crankcase.

Intake push rod housing burned except $\frac{3}{4}$ still attached to crankcase.

Push rod missing.

Cylinder head fins badly melted.

Spark plug leads hanging by wires.

Defendants' Exhibit A-4—(Continued)

No. 8 cylinder:

Exhaust pipe in place.

Intake pipe in place but coupling nut burned away.

Exhaust rocker box broken and burned away. Valve assembly intact.

Intake rocker box broken and burned away. Valve assembly intact.

Exhaust and intake push rods and housings missing except for holding nuts still attached to crankcase.

Rocker box drain sump missing.

Cylinder head fins badly burned and melted.

Spark plug leads hanging by wires.

No. 9 cylinder:

Exhaust pipe in place.

Intake pipe in place but mashed.

Cylinder head fins broken and almost completely burned away.

Valve assemblies in place.

Push rods and housings missing.

Spark plug leads hanging by wires.

No. 10 cylinder:

Exhaust pipe evident but not attached.

Intake pipe missing.

Intake half of cylinder head missing along with valve assembly.

Exhaust valve assembly hanging but not in place.

Defendants' Exhibit A-4—(Continued)

Push rods and housings missing.
Front spark plug lead in place.
Rear spark plug lead missing.
Piston near top dead center.

No. 11 cylinder:

Exhaust and intake pipes hanging in place.
Cylinder head approximately 85% broken
and burned away.
Piston approximately bottom of stroke.
Push rods and housings missing.

No. 12 cylinder:

Exhaust and intake pipes hanging in place.
Cylinder head approximately 80% broken
and burned away.
Piston approximately $\frac{3}{4}$ up cylinder wall.
Push rods and housings missing.

No. 13 cylinder:

Exhaust pipe in place.
Intake pipe in place but coupling nut
burned away.
Exhaust and intake rocker boxes burned
off but valve assemblies still intact.
Exhaust push rod and housing burned away
except for $\frac{1}{3}$ attached to crankcase.
Intake push rod and housing burned away
except for $\frac{1}{3}$ still attached to crankcase.
Spark plug leads still hanging by wires.

No. 14 cylinder:

Exhaust pipe in place.

Defendants' Exhibit A-4—(Continued)

Intake pipe in place but coupling nut burned away.

Exhaust and intake rocker boxes broken and burned away but valve assemblies still intact.

Exhaust push rod and housing missing.

Intake push rod housing missing.

Spark plug leads hanging by wires.

10. Rear case completely burned off. No rear case parts found with engine.
11. Intermediate rear case burned off except for upper $\frac{1}{3}$ including broken portion of carburetor mounting pad.
12. Fire seal and engine mounting still in place held by two upper and two right mount brackets. All lord mount rubbers burned away.
13. One piece of CO² line approximately 3' long laying on upper left side of fire seal, rear, held in place by bent engine mount arm to which is attached one fire wall mount fitting.
14. Ignition harness completely missing rear of fire seal except for short pieces of main harness flex, on both sides.

Right Engine

Internal Visual Inspection

After disassembly, all internal engine parts appeared in working order with no evidences of failure.

Defendants' Exhibit A-4—(Continued)

Visual inspection including that of the master rod bearings showed no evidence of overspeeding of the engine.

Ample lubrication inside the engine was evident throughout.

Right Engine Accessories

All engine accessories were missing including the governor, except the carburetor.

Carburetor—Stromberg

Model—PD12F5

Serial number—Plate burned off.

1. Manual mixture control cover burned off.
2. Full rich bypass assembly burned off.
3. Fuel control body cover burned off and internal parts burned.
4. Idle needle cover burned off and internal parts burned.
5. Carburetor was torn from the rear case pulling out the stud bushings.
6. Safety screen still intact on top of carburetor.
7. Accelerating pump melted and burned badly.
8. Automatic mixture control still intact but internal parts burned off.
9. Vapor floats and float chamber burned away.
10. All rubber diaphragms burned away.

Defendants' Exhibit A-4—(Continued)

11. The idle needle was subject to intense heat and consequently seized in the bushing at a position indicative of approximately $\frac{1}{2}$ throttle opening.

This carburetor has been burned beyond deciphering any functioning evidence.

Right Engine Propeller

Right position assumed because of damage evidence.

1. The engine propeller shaft and reduction gear assembly still attached to the propeller.
2. All attaching locks were in their proper places.
3. The majority of the propeller nuts were loose as well as the distributor valve. Possible assumption of the looseness due to the intense heat encountered in the fire.
4. The dome was dented approximately $\frac{1}{4}$ " deep just to one side of the front center. All other dome internal parts appeared lubricated and in working order.
5. No. 1 blade:
Bent back approximately 45° with about $\frac{1}{4}$ of the blade burned off.
No. 2 blade:
Bent back approximately 45° with edges burned.
The driven gear is broken and spread about 1".

Defendants' Exhibit A-4—(Continued)

No. 3 blade:

The tip only is bent forward approximately 30°, the blade remained unburned.

The driven gear appears undamaged.

6. The drive gear is marked and nicked where driven gears broke.

Left Engine

R 1830-90D P & W

Serial No. missing

External Visual Inspection

1. All of the engine to the front section drive coupling is broken off just ahead of the front section mounting studs.
2. Ignition harness bent back toward the rear of the engine at cylinders numbers 4 and 6.
3. Front sump still attached to front lower case with both rocker sump and scavenge oil line intact.
4. Governor control pulley bracket still attached to number 4 cylinder, broken away from the exhaust rocker box but held to the intake rocker box. Micarta pulley is broken off or burned away. Governor control pulley and shaft laying between the engine lifting eye and number 14 cylinder.
5. The engine oil inlet fitting had approximately 6" of hose, 2 hose clamps and approximately

Defendants' Exhibit A-4—(Continued)

8" of aluminum tubing still intact, the rest being burned away.

6. The engine oil outlet fitting had approximately 5" of hose, 2 hose clamps and approximately 10" of aluminum tubing still intact, the rest being burned away.

7. Engine mount ring still intact and attached to the engine. The mount arms are bent and broken.

The fire seal is bent toward the front of the engine and still intact.

8. The CO² line is still in place and bent slightly.

9. Head baffles partially burned away from cylinders numbers 3, 4, 5, 6, 7, 9, 10 and 11.

10. Intake push rods and housings on cylinders numbers 2, 4, 6 and 14 were bent presumably due to impact.

Exhaust push rods and housings on cylinders numbers 2, 4 and 6 were bent presumably due to impact.

11. Intake tappet and guide of number 4 cylinder is broken off flush with the crankcase.

Lower fins of number 4 cylinder are mashed.

12. All rocker box drain hoses have been burned off.

13. Exhaust pipes missing from cylinders numbers 10 and 11.

Defendants' Exhibit A-4—(Continued)

External Visual Inspection

Left Engine

14. Exhaust rocker box broken off of number 2 cylinder.

All other cylinder assemblies and push rod assemblies are intact.

Hydraulic pump

Serial number BC 659-R

Mounted on right side of engine.

Intact and not burned except hoses burned off completely.

Vacuum pump

Serial number missing.

Intact and not burned except hoses burned off completely.

Propeller feathering motor and pump

Serial number missing.

Motor partially burned away at brush end.

Oil inlet fitting broken off.

Oil outlet elbow and line intact with rubber covering of flexible steel hose burned off.

Tachometer

Intact with connections burned off.

Starter

Serial number missing.

Intact except terminal attaching cover missing and terminal outlet box partly burned away.

Approximately 2' of cable still attached with insulation burned off.

Defendants' Exhibit A-4—(Continued)

Generator

Serial number A-10312.

Attached to engine.

Brush cover torn off.

All leads burned off.

Magneto booster

Attached to part of engine mount.

Wires burned off.

Junction box

Attached to part of engine mount.

Wires burned but most of flex, conduit still attached.

Propeller governor

Missing.

Left Engine

Internal Visual Inspection

After disassembly all internal engine parts appeared in working order with no evidence of failure.

Visual inspection, including that of the master rod bearings, showed no evidence of overspeeding of the engine.

Ample lubrication inside the engine was evident throughout.

Left Engine Accessories

Accessories disassembled for inspection.

Carburetor

Model PD12F5

Serial number 72220

Defendants' Exhibit A-4—(Continued)

1. All hoses have been burned off.
2. Carburetor loose from engine due to broken engine mounting pad.
3. Lower part of scoop still attached.
4. Mixture and throttle control arms are bent but still operative.
5. Throttle linkage broken but still bolted to carburetor.
6. The idle valve shaft is broken and the linkage torn loose from the throttle shaft.
7. The idle valve was subject to intense heat and consequently seized in the bushing at a position indicative of approximately $\frac{1}{2}$ throttle opening.
8. All rubber diaphragms have been burned, and the remainder of the carburetor subject to intense heat, destroying evidence of functioning ability.

Fuel pump

Type—Chandler Evans

Model—4101

Serial number missing.

1. The fuel “in” and “out” hoses and the fuel drain line have been burned off at the pump.
2. The pressure regulator screw cover has been broken off.

Defendants' Exhibit A-4—(Continued)

3. Internally the pump vanes have rusted and seized to the rotor and rear bearing.
4. The diaphragms have been damaged by intense heat as well as the remainder of the unit.

Left Magneto

Model—Bosch SF 14

Serial number missing

1. The covers have been burned off.
2. The distributor block, rotor, and coil assemblies have been badly damaged by fire.
3. Other than indications of intense heat, the remainder of the magneto shows no signs of failure.

Right Magneto

Model—Bosch SF 14

Serial number missing

1. The covers have been burned off.
2. The distributor block, rotor and coil assemblies have been badly damaged by fire.
3. Other than indications of intense heat, the remainder of the magneto shows no sign of failure.

Left Engine Propeller

Position assumed because of damage evidence.

1. The engine propeller shaft and reduction gear assembly were still attached to the propeller.

Defendants' Exhibit A-4—(Continued)

2. All propeller locks and nuts were in their proper places.

3. No. 1 blade:

Blade twisted starting about 3' from the tip.

No burning evident.

Driven gear is broken and spread approximately $\frac{1}{2}$ " and small piece about $\frac{1}{2}$ " long broken out.

No. 2 blade:

Blade bent back with sweeping curve the entire length of the blade (bend approximately 45°).

No burning evident.

Driven gear is broken and spread approximately $\frac{3}{4}$ ".

No. 3 blade:

Blade bent back slightly (approximately 5°).

No bad nicks or dents on blade.

No burning evident.

Driven gear is broken and spread approximately 1".

4. From visual inspection there appears to be no mechanical defects in the dome assembly, except marks and nicks on the drive gear where driven gears broke.

Admitted October 12, 1950.

The Court: Does anyone know of any other exhibit not ruled upon by the Court? Defendant's Exhibit A-7?

Mr. Wilkerson: Your Honor, we would like to withdraw that at this time as counsel has entered into a stipulation as to the names of the 27 passengers aboard the plane.

The Court: Exhibit A-7 is now withdrawn and returned to counsel who offered it originally. [289]

Mr. Matthews: I have an understanding with Mr. Houghton—correct me if I am wrong—that where the middle name is used in some instances and the initial is used in some instances that there will be no objection.

Mr. Houghton: No objection at all, your Honor, on that. They are the same people.

Mr. Wilkerson: Our stipulation did not cover the names of the three crew members. We had understood from you that you would stipulate Mr. William F. Leland, the owner of the plane; Mr. Chavers and Mr. Love were the three crew members.

Mr. Houghton: We will stipulate to that. I might say also we have agreed to stipulate that counsel for defendants have a witness who would testify that the weight of Mr. Love, the other member of the crew, was 150 pounds.

The Court: And that the Court may regard this statement as evidence of that person's weight, the same as if the witness mentioned had appeared and had so testified?

Mr. Houghton: That is correct, your Honor.

Mr. Matthews: Defendants rest.

Mr. Houghton: Before defendants rest, I was going to suggest—you remember that at the beginning of the trial we reserved the right to introduce in our case in chief further evidence, if we decided we wished to, on [290] the matter of value of the plane or its equivalent, the amount of the plane's damage.

The Court: At the time of the damage?

Mr. Houghton: Yes, your Honor, and I thought possibly it should be done before the defendants rest. If I may take that up now, I think I will call Mr. Jandl to the stand.

The Court: Is there any objection to this being done before the defendant rests?

Mr. Matthews: No, your Honor.

The Court: Plaintiffs' case in chief is opened up for this purpose.

R. P. JANDL

recalled as a witness by and on behalf of plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Houghton:

Q. Mr. Jandl, you have been sworn. I understand a day or two after Mr. Leland's death you were appointed his administrator by the Superior Court of this county? A. Yes.

Q. Did you take charge of the wreckage of the plane? A. Yes. [291]

Q. At least constructive charge? Will you tell

(Testimony of R. P. Jandl.)

us whether there was any part of that plane or its accessories or equipment that was of any value for the purpose for which they were designed or intended?

A. No, nothing could be used at all. It was all just a pile of junk.

Q. What disposition was made of it?

A. It was sold to the highest bidder of three bidders.

Q. Was that simply to be melted down as scrap metal? A. To be melted down as junk, yes.

Q. Was that procedure authorized by order of the King County Superior Court? A. Yes.

(Court order marked Plaintiffs' Exhibit 9 for identification.)

Mr. Houghton: You don't have any objection to the form of this, that is, you agree that it is a true copy?

Mr. Matthews: No objection to the form.

Mr. Houghton: I offer Plaintiffs' Exhibit 9 in evidence.

The Court: As bearing upon what issue?

Mr. Houghton: Upon the issue of the amount of plaintiffs' damages. I want to tie it up later with the specific item.

The Court: Is there any objection? [292]

Mr. Wilkerson: Objected to as being immaterial. The stipulation says, "It is agreed that the crash"—we will withdraw our objection.

The Court: It is admitted.

(Testimony of R. P. Jandl.)

(Plaintiffs' Exhibit 9 received in evidence.)

The Court: What do you call that?

Mr. Houghton: It is called "Order directing administrator to dispose of personal property."

The Court: In other words, it is an order of sale of the remains of the plane?

Mr. Houghton: That is right, signed by Judge Frater on March 9, 1949.

Q. (By Mr. Houghton): Did you dispose of this salvage in accordance with Plaintiffs' Exhibit 9 immediately after Judge Frater signed that order? A. Yes, it was the same day.

Q. Did you notify D. K. MacDonald & Company, the adjusters for the defendants, of the disposition of this salvage immediately after you disposed of it?

A. Yes.

Q. And you told them the amount received for it? A. They knew the whole story.

Q. You had worked with them right along in disposing of it? [293] A. Yes.

Q. So that they would know immediately after March 9 how much was received for the salvage?

A. Yes.

Mr. Houghton: You may take the witness.

Mr. Matthews: No questions.

Mr. Houghton: That is all the evidence we want to give on that.

The Court: Is there any direct evidence of value of the plane immediately before the crash?

Mr. Houghton: No. The insurance policy is in evidence and it states the agreed value of the plane, and we can argue that if it is raised later, but it is our opinion that the law is that that is not only prima facie evidence during the life of the policy, but is conclusive evidence. In addition to that, of course, there is the testimony that the defendants brought out, that it was in excellent condition up to the time of the crash.

The Court: Do the plaintiffs finally rest?

Mr. Houghton: Yes, the plaintiffs rest, your Honor.

The Court: Is there any further testimony which the defendant wishes to offer in view of this latest testimony of the plaintiffs?

Mr. Matthews: Defendants rest.

The Court: Is there any rebuttal? [294]

Mr. Cluck: Yes, there will be brief rebuttal, your Honor, but it is just about three minutes before twelve and I rather think time could be saved if we devoted that time, with the Court's permission, to organizing.

The Court: Is there any objection to that suggestion? Court is now recessed until 1:30 this afternoon.

(At 11:59 a.m., Thursday, October 12, 1950, proceedings recessed until 1:30 p.m. Thursday, October 12, 1950.)

Seattle, Washington, October 12, 1950—1:30 P.M.

The Court: Plaintiffs may proceed with plaintiffs' rebuttal.

Mr. Cluck: If the Court please, I think Mr. Matthews has a certified copy of Civil Aeronautics Administration Form 309A, that operations limitation record of this aircraft. I would like to introduce that same form, covered in the stipulation.

The Court: Are you not able to get a white background photostat?

Mr. Cluck: Your Honor, that was procured before the Court had made that request, and we shall be glad to substitute one with a white background for this exhibit [295] as promptly as we can.

The Court: On that understanding, Plaintiffs' Exhibit 10 is now marked for identification.

(CAA Form 309A marked Plaintiffs' Exhibit 10 for identification.)

Mr. Cluck: We offer this in evidence as being a certified copy of the form entitled Operations Limitations, CAA Form 309A, on this particular DC-3 aircraft.

Mr. Matthews: No objection.

The Court: Admitted.

(Plaintiffs' Exhibit 10 received in evidence.)

PLAINTIFFS' EXHIBIT No. 10

Department of Commerce

Washington, April 19, 1949.

I Hereby Certify that the annexed is a true copy of the Operation Limitations, Form ACA309a, dated July 15, 1947, covering Douglas aircraft, manufacturer's serial number 10181, registration number 79025, which was in full force and effect January 2, 1949, according to records on file in the Civil Aeronautics Administration.

/s/ EDWARD F. DODD,
Chief, Aircraft Records
Section.

Office of the Secretary

I Hereby Certify that Edward F. Dodd, who signed the foregoing certificate, is now, and was at the time of signing, Chief, Aircraft Records Section, Civil Aeronautics Administration and that full faith and credit should be given his certificate as such.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of Commerce to be affixed this nineteenth day of April, one thousand nine hundred and forty-nine.

For the Secretary of Commerce:

[Seal] /s/ GERALD MAY,
Chief Clerk.

440

R

OPERATION LIMITATIONS

CAA IDENT. MARK

NC 79025

MAKE	DATE MFRD.	SERIAL NO.	DESIGNATION	TYPE CERT.
Douglas Model DO3C-8103C	9/43	10181	Land*	669

ENGINE AND AIR SPEED LIMITS NOT TO BE EXCEEDED

(All Values Are Maximum and Are NOT RECOMMENDED OPERATING LIMITS)

ENGINE LIMITS						TRUE INDICATED AIR SPEED			
TAKE-OFF	MINUTES	ALTITUDE	IN. HG	R. P. M.	H. P.	FUEL OCT.	CLIMB OR LEVEL FLIGHT	WEIGHT	M. P. H. KIOTS
One	Any	Any	48.0	2700	1200	91	Up to 24,800	217	
TAKE-OFF	or	Any	47.0	2750	1200	91	GLIDE OR DIVE (Smooth Air Only)	Up to 24,800	262
SEA LEVEL		XX	41.5	2550	1050	91	FLAPS EXTENDED	Up to 24,800	112
SEA LEVEL							CLIMB OR LEVEL FLIGHT	25,200	211
ALTITUDE	XXXX	7500	32.5	2550	1050	91	GLIDE OR DIVE (Smooth Air Only)	25,200	257
TITUDE							FLAPS EXTENDED	25,200	112
LOW IMP.							Climb or	DATUM	
LOW IMP.							Low. flight	26,900	220
HIGH IMP.							Glide or		
HIGH IMP.							Dive	26,900	241
							Flaps Ex-		
							tended	26,900	112
							Datum: I.E. Center section		
							wing. (Station 192.5)		

USEABLE CEILINGS AND ADDITIONAL CONDITIONS*

CEILINGS (FT.)	WEIGHT	R. P. M.	FOLD PRESS.	FUEL OCT.	T. I. A. S.	PROP. DEICER	WING DEICER
9,500	26,900	2550	P.T.	91	112	---	Yes, but Not Operating
11,600	25,200	2550	P.T.	91	112	---	Yes, but Not Operating

*Standard air, any engine inoperative, inoperative propeller fully feathered, no air intake on "cold air."

Reduce useable ceiling when Items 211f, 211h or 1 installed.

MAXIMUM TAKE-OFF WEIGHT

MAXIMUM LANDING WEIGHT

SEA	25,200 (Pass)	SEA	25,200 (Pass)
	26,900 (Cargo)		26,900 (Cargo)

OPERATIONS AUTHORIZED

C.G. Range 47.1 (11% MAC) to 47.6 (28% MAC)

*See weight and Balance Data Section for loading information.

INSPECTOR'S SIGNATURE

R. L. Ogden 726

DATE

July 15, 1947

ADDITIONAL OPERATIONS AUTHORIZED

YES

NO

☐

☒

(IF YES SEE OVER)

THIS PLACARD MUST BE DISPLAYED IN VIEW OF THE PILOT

FOLD HERE

11 11 2

AD

LOUIS MUGGE

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cluck:

Q. Will you state your full name?

A. Louis Charles Mugge.

Q. By whom are you employed?

A. I am an agent of the Civil Aeronautics Administration.

Q. In what capacity?

A. As an aviation safety agent assigned to non-scheduled [296] and scheduled air carriers.

Q. You are familiar generally with the CAA Form 309A entitled Operations Limitations?

A. Generally, yes, sir.

Q. Would you please refer to this Operations Limitations form identified as Plaintiffs' Exhibit 10 and read the sentence appearing on the bottom of that form under the heading "Operations Authorized"? A. Did you want the sentence?

Q. Yes.

The Court: You may read it aloud. That document shown you is already in evidence.

The Witness: "See weight and balance data."

Q. No, the sentence just preceding.

A. "C. G. Range plus 47.1 (11% MAC) to plus 70.6 (28% MAC)."

Q. And the next sentence?

(Testimony of Louis Mugge.)

A. An asterisk sentence, "See weight and Balance Data Section for loading information."

Q. What do the initials CG mean?

A. CG is commonly referred to as center of gravity.

Q. What does plus 47.1 refer to?

A. That is a position relative to your CG location.

Q. What do the figures refer to, inches, pounds or what? A. In this case, it is inches.

Q. Inches from where, measuring where? [297]

A. From your CG location.

Q. Would you repeat again what 47.1 refers to?

A. Your 47.1 is your index in location to your center of gravity.

Q. When we speak of center of gravity, just in laymen's language, what do we mean?

A. Center of gravity is the point on the aircraft which would be your balance point.

Q. In other words, you could conceive of your aircraft much as you would a lever and fulcrum?

A. That is right.

Q. Where the center of gravity is might depend upon where your weight, whatever it is, is placed with reference to the position on the aircraft, is that right? A. That is right.

Q. It would vary depending on whether you put the loads towards the tail section, up in the nose, the center or any other point?

A. The CG is a fixed location on your aircraft,

(Testimony of Louis Mugge.)

and these other figures are limitations that you might utilize in your loading of the aircraft.

Q. With reference to the fixed position?

A. Yes.

Q. When you say plus 47.1, what does that mean?

A. I am not too sure of that figure. I believe it is [298] the inches in relation to your CG.

Q. What does 11% MAC mean?

A. That shows the percentage in relation to your CG. There is two different systems.

Q. What do the initials MAC stand for?

A. That I don't recall offhand. I am not too familiar with that phase.

Q. The whole sentence is a formula for weight distribution whatever the weight is in your aircraft, is that correct?

A. Right.

Q. Would you refer to the flight plan filed in connection with this aircraft, which has been identified as Defendant's Exhibit A-14. There is a notation referring to time of filing on that flight plan. Would you tell us what it is, read it into the record exactly as it appears on the exhibit, the time it was filed.

A. I will have to find it first. It says "Received RB January 3 0257 Z 1949."

Q. What measurement of time is used in connection with filing those forms?

A. Z designates it as Zebra or Greenwich time.

Q. What difference is there between the Greenwich time and Pacific Standard Time?

(Testimony of Louis Mugge.)

A. It is an eight hour plus zone, that is, the Greenwich time would have been eight hours earlier than our time. [299]

Q. So the time it was used, the tower in Seattle——

A. That's right.

Q. ——what would be the time of filing in terms of our ordinary time at the tower here in Seattle?

A. That would have been 6:57 p.m.

Q. You have had something to do with aircraft for quite a while, have you?

A. Some time, yes, sir.

Q. When did you first enter the field?

A. I have been active in aviation since 1935.

Q. Would you outline briefly for us what the background of your experience has been?

A. Yes, sir. I have been a naval aviator with the Naval Air Transport Service during the war. Prior to that, I was a mechanic with the Navy. My pilot hours are about 6000 hours, about 5500 hours of which is in multiple engine aircraft. I hold an airline transport rating and an AE mechanic's certificate.

Q. Have you had anything to do with flying under icing conditions in DC-3 aircraft?

A. Yes, sir, I have.

Q. During what period and in what area?

A. I don't recall the exact number of hours in icing experience. I have about 750 hours instrument time, of which maybe 15 per cent of that is in some phase of icing. [300]

Q. Have you flown DC-3's with overloads?

(Testimony of Louis Mugge.)

A. Yes, I have.

Q. Up to what weights?

A. I don't recall exactly. Our normal operation——

Mr. Matthews: Objected to as incompetent, irrelevant and immaterial.

Mr. Cluck: It is part of the experience.

Mr. Matthews: We tried to show in our case in chief, if the Court please, of various witnesses the experiences they had had in flying airplanes with small accumulations of ice and frost on the wings, and counsel objected and the Court sustained the objection on the theory that wasn't proper. I think it should be on the same theory this is objectionable, because we would have to go into all the facts and circumstances, the condition of the plane, condition of the weather, the pilot's experience. It seems to me we get very far afield of the issues involved in this lawsuit, the fact that somebody else flew a plane overloaded and may or may not have got away with it.

The Court: I do not understand the purpose, and I would think the Court's ruling in this instance should be the same as before.

Mr. Cluck: I will withdraw the question, your Honor.

Q. You are familiar in general with the path taken on [301] the runway by the aircraft that is the subject matter of this suit, are you not?

A. Yes, sir. I was a member of the investigation board.

(Testimony of Louis Mugge.)

Q. I am not asking you about anything having to do with any investigation. All I want to ask you is whether you saw the tracks on the runway or on the ground made by this aircraft?

A. Yes, I did.

Q. You have your own direct personal knowledge of what that was? A. Yes.

Q. Would you briefly describe the course taken by the aircraft from the point where it started to turn off the runway up to the point where it first became airborne?

Mr. Matthews: Your Honor, before the witness answers this question, may I ask one or two questions to show how he obtained this information which I think will have a definite bearing upon its admissibility in conformity with the consistent rulings of the Court throughout the trial.

The Court: If it is a fact that any of this information went into the report of the Board, I am going to sustain objection to it. I advise counsel of it in advance.

Mr. Cluck: It did, your Honor. [302]

The Court: I think that was the sense of the Court's previous ruling in connection with the defendants' case. It will be the same now.

Mr. Cluck: Very well.

Q. (By Mr. Cluck): When you referred a few minutes ago to 6:57 as having been the time of filing of the flight plan, you were referring to 6:57 the evening of January 2, is that correct, just so we have it very clear?

(Testimony of Louis Mugge.)

A. That would be right.

Q. 1949? A. 1949.

Q. Referring for a moment further to the operations limitations form before you, just above and before the portion of it marked "Operations Authorized" is the insertion "Maximum Take-Off Weight 25,200 passenger, 26,900 cargo." What does that mean in terms of take-off weight? For what purpose is that insertion made?

Mr. Matthews: If the Court please, I think the document speaks for itself. It provides a take-off weight maximum when the plane is carrying passengers, and those were the conditions here involved.

The Court: What do you seek to prove which is not implied?

Mr. Cluck: I realize it is difficult to frame the question. I seek to prove that each of these maximums [303] are applied by the CAA as one that will permit single engine take-off, that is, to provide for single engine take-off in emergency with safety factors.

Mr. Matthews: Whatever the reasons were that motivated the CAA in providing these safety factors in these maximum take-off weights, it is admitted already in evidence that the maximum take-off weight for an airplane carrying passengers is the figure that has already been admitted in the request for admissions that have been made by the plaintiffs in this case, and it seems to me to serve no useful purpose in going into the question of the

(Testimony of Louis Mugge.)

reasons for the fixing of those limitations. They have the form of law, and whether they are proper limitations or improper limitations, they are admitted to be the limitations applicable to this flight and the safety margins that the CAA in its wisdom concluded proper and necessary.

Mr. Cluck: The reply to that is that that is a matter that counsel can argue as they see fit. We, of course, take the view that overloading on the basis of the evidence is clearly out of the case, but they have asked us and we did admit that the operations form contained certain entries. It seems to me for the purpose of clarity that a brief answer to this question, which could be provided by an extended examination of the applicable CAA regulations, could be answered in a word [304] by this witness if he knows.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

The Witness: It simply means that your gross load will not exceed 25,200 when you are carrying passengers, or you are allowed to go 26,900 when you are carrying cargo.

Mr. Matthews: I move the last part of the answer be stricken. It is not applicable to this case because the plane was not carrying cargo.

Mr. Cluck: It is still a part of the form counsel themselves asked us to admit as being part of the record.

(Testimony of Louis Mugge.)

Mr. Matthews: We only asked you to admit what the maximum take-off weight was on a flight of the type here involved. You are trying to bring in a different type of flight, cargo operations.

The Court: The statement as to cargo will be stricken. The Court will disregard it.

Q. (By Mr. Cluck): The maximum weight of passengers is computed on what basis?

Mr. Matthews: I submit it makes no difference upon what basis it was computed. It is a rule and regulation of the Civil Aeronautics Administration which has the force and effect of law and becomes the absolute maximum [305] limitations, makes no difference how they computed it, why they computed it.

Mr. Cluck: This is the same argument we made a moment ago, and it is just following up on the prior question, to get the information we told the Court we intend to.

The Court: Overruled.

Mr. Matthews: May I ask the witness one or two qualifying questions to see if he is qualified to answer the question?

The Court: You may do so.

Mr. Matthews: By whom were these maximum take-off weights computed?

The Witness: This is strictly engineering data and computed by the manufacturers after extensive tests.

Mr. Matthews: Did you have anything to do with computing them?

(Testimony of Louis Mugge.)

The Witness: No, I did not.

The Court: Have you been to school and received any education which concerned this detail?

The Witness: No, I have not.

Mr. Cluck: May I ask one question?

The Court: Is there any other question you wish to ask? You may inquire.

Q. (By Mr. Cluck): Are you familiar with application of [306] these requirements in respect to their issuance of airworthiness certificates or otherwise? A. No, that is not my department.

Mr. Cluck: I will withdraw the question, then. That is all.

Mr. Matthews: No questions.

The Court: You may step down. Call the next witness.

Mr. Cluck: Mr. Miner.

The Court: I believe Mr. Miner has already been sworn. You may resume the stand.

DOUGLAS MINER

called as a witness by and on behalf of plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cluck:

The Court: What is your name for the record?

The Witness: Douglas D. Miner.

Q. I believe you testified, Mr. Miner, that you

(Testimony of Douglas Miner.)

operated an aircraft maintenance business down on Boeing Field? A. That's right.

Q. And you perform work on contract or otherwise for various operators of aircraft?

A. Yes. [307]

Q. And did so for Mr. Leland? A. Yes.

Q. Did you have anything to do with the removal of ice on the airplane that is the subject matter of this suit on the evening of January 2, 1949? A. Yes.

Q. Would you tell in your own words what you did in that connection?

A. Late in the afternoon of January 2, we washed the snow from the wings and tail surface of the airplane with high pressure water. Prior to the take-off, Mr. Chavers, Mr. Leland and myself washed the wings and the tail surfaces with alcohol.

Q. Could you go into a little more detail? Your first operation was washing the frost and snow and ice with the high pressure hose, is that it?

A. Yes, it was loose snow at that time.

Q. That was at what hour?

A. About 5 or 5:30.

Q. Mr. Leland asked that you do that, is that right? A. Yes.

Q. Approximately when did you complete that phase of the work?

A. I would say about 6 o'clock.

Q. Then what did you do after that? When did you begin [308] doing any further work, if any, approximately?

(Testimony of Douglas Miner.)

A. About 8:30 or 9 we started washing with alcohol.

Q. Approximately how long prior to the taxiing of the aircraft had you completed the removal of the ice, if you remember?

A. Five or ten minutes.

Q. Five or ten minutes prior to the time that it began taxiing? A. Yes.

Q. Would you describe in just a little more detail what you did with the alcohol?

A. We took buckets of this alcohol——

Q. What kind of alcohol was it?

A. Isopropyl alcohol.

Q. Is that used regularly in connection with ice removal?

A. Yes, that is the one solution everybody uses.

The Court: How do you spell the word before the word alcohol?

The Witness: I-s-o-p-r-o-p-e-l, I believe.

Q. Tell us just as though we had never seen it what in general you did with the alcohol.

A. We took ordinary floor mops and dipped them in this alcohol and scrubbed the wings with it. That scrubs off the ice already there and makes the surface so that ice won't form on it so readily again. [309]

Q. Did you go all over the wings?

A. All over the upper surfaces of the wings and tail surfaces.

Q. Tell us what condition the aircraft was in

(Testimony of Douglas Miner.)

with respect to presence of ice, if any, when you got through with your operation?

A. The upper surfaces, as far as I could see, were free from ice. Mr. Leland and Mr. Chavers seemed to be of the same opinion.

Mr. Matthews: I object to the last part of the statement and move it be stricken.

The Court: It will have to be stricken. It is a comment upon the others' attitudes.

Q. Did you have anything further to add?

A. No.

Q. What about the condition of the under-surfaces?

A. There were very small streams, just where drips of water had run over the leading edge to the trailing edge. I don't think any of them were over a quarter of an inch wide, and smooth.

Q. Reference was made to what were termed minute icicles, an eighth to a quarter of an inch long, from the rivets of the airplane. Did you notice those, or were they there?

A. I didn't notice them.

Q. How many times was it that you worked at the matter [310] of removing ice or frost?

A. Twice.

Q. Those two times? When you applied the water the first time, from what position was it applied with reference to the aircraft?

A. Above the leading edge of the wings and tail surfaces.

Q. Why was it applied from that position?

(Testimony of Douglas Miner.)

A. The trailing edge of the wings is lower, therefore the water would run freely and wash all the snow off and drain better.

Q. Did you have occasion to go into the cockpit of the airplane before take-off? A. Yes.

Q. Approximately what time did you do that?

A. Well, it was while the passengers were loading, I imagine it would be about 20 minutes before the take-off.

Q. What was the condition as to visibility at that time?

A. At that time the cockpit was high enough so that you could look over the top of the fog and see lights all over the city and see the boundary lights on the south end of the field, see all the lights on the administration building.

Q. The fog then was low-lying ground fog, is that about it? A. Yes.

Mr. Cluck: That is all. [311]

Cross-Examination

By Mr. Matthews:

Q. Had you ever had any experience before this occasion that you have just testified to in removing ice from an airplane? A. No.

Q. When Mr. Leland asked you to remove the ice from the airplane, I will ask you if you stated to him, "I don't know how"?

A. Well, there is a question of time. Which ice removal are you speaking of?

(Testimony of Douglas Miner.)

Q. Did you make that statement to him at any time that evening? A. I don't recall.

Q. You said a minute ago, you asked me which time I was referring to. Did you have two different conversations with Mr. Leland about moving the ice?

A. The first one was by telephone. He knew it had snowed and he called and asked us to get that snow off the wings.

Q. What did you tell him?

A. I probably told him I would take it off.

Q. Didn't you tell him you didn't know how?

A. I don't think I did, but I am not sure.

Q. Had you ever had any previous experience in removing ice from airplanes? [312]

A. Very little.

Q. Pardon? A. Very little, if any.

Q. Isn't that what you told Mr. Leland?

A. I could have.

Q. As a matter of fact, you have omitted one step about this attempt to remove this snow and frost from the wings, haven't you?

A. I don't think so.

Q. Don't you remember that you took just an ordinary hemp rope and sawed this hemp rope back and forth fore and aft across the wings in an attempt to remove the ice?

A. That was in conjunction with the water, to pull off a major portion of the snow so you wouldn't have so much to wash off.

Q. Isn't it a fact that you tried to remove it

(Testimony of Douglas Miner.)

with a rope, roughed it up, were unable to do so, and that is the reason you used the water?

A. No, that is untrue. We attempted to take off portions of the snow with the rope.

Q. How much snow and ice was on the airplane when you started this operation?

A. I imagine about three inches.

Q. How long had the airplane been standing out in the open? How many days? [313]

A. Several days.

Q. During most of that time, I will ask you to state whether or not the weather had been around or below freezing?

A. I believe the preceding day was quite warm, but that day it was cold.

Q. Around the freezing point? A. Yes.

Q. Did this airplane have wing covers?

A. It had wing covers, yes.

Q. Had Mr. Leland at any time during that day put the wing covers on the airplane? A. No.

Q. What are the purpose of wing covers?

A. They are to protect the wings from getting snow and ice on them.

Q. Was the airplane taken inside into a warm place at any time for the purpose of removing this ice? A. No.

Q. Was this hot water or cold water that you squirted on the airplane? A. Cold.

Q. Do you remember having a conversation with Mr. Vineyard, the gentleman seated here in the front row, concerning the water that you had

(Testimony of Douglas Miner.)

squirted onto the wings in an attempt to remove the ice? [314] A. No.

Q. Do you remember him asking you the manner in which the water had been squirted onto the wings and you said—do you remember what you told Mr. Vineyard as to how you applied the water to the wings?

A. I believe he testified that, but I don't think there was a verbal conversation with Mr. Vineyard and I on it.

Q. How did you apply this cold water to the wings?

A. From standing on a workstand at the leading edge of the wing and blasting the snow and ice off with a high pressure hose.

Q. And this water then, this cold water, was squirted in both directions both fore and aft of the wings? A. No, just aft.

Q. You were standing on a workstand in front of the wing? A. Yes.

Q. Did you squirt the water across the front of the leading edge? A. Yes.

Q. That leading edge curves in a gentle, symmetric curve, rather egg-shaped, does it not?

A. Yes.

Q. And the water was being squirted towards that leading edge?

A. On top of the leading edge. [315]

Q. And along the leading edge, wasn't it right at the leading edge? A. Very little.

Q. And that water, some of it, would run down,

(Testimony of Douglas Miner.)

run around the leading edge and follow the leading edge back towards the trailing edge of the plane?

A. Very little.

Q. The wing slopes starting at the trailing edge and going towards the tail of the plane, the water would slope in that direction, would it not, from the leading edge aft towards the rear?

A. Yes.

Q. When you applied this alcohol, did you apply any of the alcohol underneath the wings?

A. No.

Q. How much alcohol did you use?

A. About seven and a half gallons.

Q. And you dampened the mop slightly with this alcohol, isn't that right?

A. The mop was wet, but not dripping or drenched.

Q. Do you know how many feet or square feet of surface there is on the wings of a Douglas DC-3 airplane, this particular airplane? A. No.

Q. Have you even a rough idea? [316]

A. No.

Q. This water could have gotten through the aileron slots and gotten under the side of the aileron, is that not right? A. It is possible.

Q. The aileron is located at the trailing edge of the wing, is it not? A. Yes.

Q. And it is one of the controls in the handling of the airplane? A. Yes.

Q. And there is a space or a slot between the wing and the aileron? A. Yes.

(Testimony of Douglas Miner.)

Q. And nothing to prevent this water that you were squirting from the wing from running down into this slot and underneath the wings?

A. No.

Q. You were applying this cold water about what time? A. 5:30 or 6 o'clock.

Q. Do you remember what the temperature was at that time?

A. Slightly above freezing, I think.

Q. At 1802, that would be two minutes after six, were you applying the water at that time?

A. I think the operation was finished by that time. [317]

Q. Did you ever make a statement under oath that the temperature at the time you were applying this water was 30 degrees? A. I may have.

Q. Do you have any recollection whether you did or didn't? A. No, I don't.

Q. Would you say that you had any independent recollection now as to whether or not it was? That would be below freezing, of course.

A. I would say it would be near that temperature.

Q. Right around 30 degrees? A. Yes, sir.

Q. Did the temperature continue to drop from six o'clock on? A. I believe it did.

Q. Can you tell us what the condition of the ground was where you were working, around where you were working in this operation?

A. All the ground was very slippery.

Q. Because of ice and snow? A. Yes.

(Testimony of Douglas Miner.)

Q. Was any attempt made to remove the ice and snow from the fuselage of the plane? A. No.

Q. You didn't at any time saw this rope back and forth across the fuselage? [318] A. No.

Q. Did you apply any water to the fuselage?

A. No.

Q. It was after sundown when you were applying this water? It was dark?

A. Well, it was near dark, getting dark, at any rate.

Q. Did you use any lights? A. Yes.

Q. I will ask you if you ever made a statement under oath to anyone that you did not use any lights during the operation that you have just referred to?

A. The operation I refer to is washing off the airplane with the water earlier in the evening. At that time there was sufficient light, there was high lights on the poles there.

Q. You did not use any lights other than some lights that may have been around the field?

A. Well, the lights were very close to the airplane. The lighting was sufficiently good to see that.

The Court: What time are you speaking of when you said you used some lights?

The Witness: Between five and six.

Q. Did you ever make a statement that this ice caused a rough effect or a stubble effect on the wing?

A. That was later in the evening, that ice.

(Testimony of Douglas Miner.)

Q. Well, tell us when that rough stubble effect began [319] to form?

A. That, I believe, formed more during the time it was parked in front of the administration building than any other time.

Q. And did that form over the entire surface of the wings? A. I believe so.

Q. Did you ever make the statement that this frost stuck right onto the water that was on the wing? A. I don't believe so.

Q. I will ask you if you ever made under oath this statement:

“Q. You spoke of the rough effect, or, I presume, a stubble effect. Did that form over the entire surface of the wing?

“A. I believe it did. It was just like white frost, only it wasn't white, it was clear, and it stuck right on the water that was on the wing”?

A. I made that statement.

Q. I will ask you if you ever made this statement:

“Q. Was there any attempt made to get the ice off the wings with a rope?

“A. Yes, that was prior to the hosing operations”?

A. Yes.

The Court: With what?

Mr. Matthews: Prior to the hosing [320] operations.

The Court: With what instrument?

(Testimony of Douglas Miner.)

The Witness: A rope.

“Q. Was there any attempt made to get the ice off the wings with a rope?

“A. Yes, that was prior to the hosing operations.

“Q. How successful was that?

“A. That left a very rough surface.”

Did you make such a statement? A. Yes.

Q. Was the ice washed off completely before the alcohol solution was applied?

A. That was three or four hours prior to the alcohol solution.

Q. Maybe you didn't understand my question. Was the ice washed off completely before the alcohol solution was put on? A. Yes.

Q. I will ask you if you ever made this statement under oath:

“Q. And was the ice washed off completely before the alcohol solution was put on?

“A. No, it was rubbed off with it at the same time”?

A. That is a little different timing there. More ice had accumulated since it was washed off with a hose.

Q. Was there any attempt made to get the ice off of the [321] stabilizers or the ailerons?

A. Yes.

Q. I will ask you if you ever made this statement:—

Mr. Chuck: Your Honor, we object to counsel's

(Testimony of Douglas Miner.)

asking these questions. I notice he is referring to the transcript of the CAA hearing. It is simply an indirect way of asking the witness about something that was not properly before the Court at this time.

Mr. Matthews: It is not an exhibit. I am just asking this witness what I am referring to.

The Court: If that is a part of the CAB report, I do not think you can use it in this instance any more than in the other two in which the matter has been before the Court. The transcript of the proceedings is a part of the report, is it not? I do not see how you can divide it into parts. At least, it is such a debatable question that I don't think it is appropriate. I think the Court should rule against you and the Court does.

If we are going to have that rule against using CAB reports, which is bound to include the official information used in making up the report, any factual data that went into the form of the report as a factual basis must be regarded as a part of it. If you are going to let in three lines of the report, or three lines of some factual showing that caused the person dictating the report, and [322] which was later signed by the Board members, to be used, **you are defeating the spirit of the provisions of the law relating to the use of the report, so I sustain this objection.**

Mr. Matthews: Very well, your Honor. In view of the Court's ruling, I will have to discontinue any further examination along that line.

(Testimony of Douglas Miner.)

Q. (By Mr. Matthews): Mr. Miner, what was the capacity of the oil tanks on this airplane?

A. Twenty-nine gallons each.

Q. Two twenty-nine gallon tanks?

A. Right.

Mr. Matthews: No further questions.

The Court: By "oil tanks," what do you mean?

The Witness: Lubricating oil.

Redirect Examination

By Mr. Cluck:

Q. You mentioned the fuselage of the airplane. In a word, just what part of it is that?

A. That is the main body, or where the passengers are carried.

Q. The portion at right angles to your wings in which the passengers or cargo or whatever it is are placed, is that right? A. Yes. [323]

Q. In response to the question of counsel, you said that you didn't apply water to the fuselage. State why you did not.

A. In the past, snow and ice on the fuselage is not considered too critical.

Q. Was there much on the fuselage?

A. There was enough to show color. I imagine there was two or three inches.

Q. You spoke of the stubble effect while the plane was in front of the administration building. What happened to that afterwards?

A. We washed that off with alcohol.

Mr. Cluck: That is all.

The Court: You may step down. Call the next witness.

Mr. Cluck: Your Honor, Mr. Mugge has asked to be excused. We have no objection.

The Court: Is there any objection to his being excused?

Mr. Matthews: No objection, your Honor.

The Court: Mr. Mugge is excused.

Mr. Cluck: Mr. Wiley.

The Court: You have already been sworn, Mr. Wiley. You may resume the stand. [324]

ROBERT WILEY

called as a witness by and on behalf of plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cluck:

Q. You testified already, Mr. Wiley, that you were in the tower at the time of the accident?

The Court: Let his name be stated here at this place for the convenience of the record.

Q. Would you give us again your full name?

A. Robert H. Wiley.

Q. You were in the tower at the time of the accident at Boeing Field? A. Yes, sir.

Q. And you were in charge of giving taxi and other clearances to the aircraft taking off?

A. That is correct.

Q. State what other aircraft cleared for take-off

(Testimony of Robert Wiley.)

during the period of a half hour preceding this accident?

Mr. Matthews: If the Court please——

The Court: Has that not already been asked and answered?

Mr. Cluck: No, it was not answered, your Honor. He was going to check his own notes on it, and it was objected [325] to as not being properly part of cross-examination, so we reserved it for rebuttal.

Mr. Matthews: The objection was sustained, as I recall.

The Court: It seems to me it is too late. That should have been part of the case in chief. It is an additional objection, it seems to me. I do not think you should go into this now. This is a matter that should have been proved as a part of the plaintiffs' case in chief.

Mr. Cluck: Could I be heard a moment on that?

The Court: I will hear you.

Mr. Cluck: As previously indicated and covered in the memorandum, it is respectfully submitted that in view of the clear holdings of several cases, that defendants have the burden of showing negligence if that is one of their defenses that they want to prove. We do not agree it makes any difference, because the insurer takes on the risk of negligence along with other risks, but to the extent it comes in the case at all it comes in as part of the affirmative defenses which defendants have alleged and which it is incumbent upon them to prove.

(Testimony of Robert Wiley.)

In the course of their examination of witnesses, they asked Mr. Wiley certain questions with respect to events on the field that night. A good many of the questions and [326] a good part of the subject matter covered by this and other witnesses related to the matter of safety conditions, and we submit it is properly a matter of rebuttal, in the way of meeting that point, to show among other things that scheduled and non-scheduled carriers were using the field regularly that evening shortly before the accident in question, and we could do that by a very brief question and answer.

Mr. Matthews: If the Court please, this witness was on the stand during our case in chief. This same question came up. The question was then asked of this witness, and I am sure I am not wrong in my recollection, we objected at that time because the fact that some airplane had taken off half an hour before would have no bearing upon whether or not this airplane should or should not have taken off, because it is undoubtedly—the testimony here shows conclusively that the weather conditions were variable. The fact that some other airplane may have violated the CAA regulations or minimums—there are different minimums for regular airline planes and non-scheduled planes, and it requires us at this stage of the game in rebuttal to examine into all the facts and circumstances under which some other airplane took off at some other time, and I think certainly that is incompetent, irrelevant and immaterial and does

(Testimony of Robert Wiley.)

not come properly [327] at this time in the case.

The Court: I think permission ought to have been obtained expressly to save this for rebuttal, in view of the fact that it came up in connection with cross-examination of this witness before.

Mr. Cluck: If your Honor please, I will have the court reporter in a recess confirm this, and I will certainly abide by what the reporter says. The record is that one of the grounds for the objection made by counsel was that it was not proper cross-examination because it related to a matter not covered by him in direct. It is true he made the additional argument that is repeated now to the effect that we should not be permitted to inquire at all as to what other aircraft took off, but I think the record will show that the Court sustained the objection on the first ground, that is, it was not proper cross-examination, and we indicated, if I am not incorrect, that we would recall this witness on rebuttal.

The Court: If that was done, the Court will not sustain the objection. I had the impression, and it may be wrong, that it was intended to call him back upon further investigation in connection with that time, but I believe we will have to pass it now, because it will probably take too long to find it in the reporter's notes [328] at this moment.

Mr. Cluck: If counsel prefers, your Honor—it is immaterial to us—if he wishes to re-open his examination of this witness and put us in the position of completing the cross-examination, we have no

(Testimony of Robert Wiley.)

objection to that. It is just that we would like the opportunity to ask the question before the case is over, that's all.

The Court: I think clarity of each position in this matter ought to be reviewed and better established than it is in my mind right now, and I think the reporter's notes are needful for that purpose. We will defer further examination and see how that matter was left at that time. If the Court did do what Mr. Cluck says the Court did,——

Mr. Cluck: Says "I think the Court did."

The Court: ——then I will say that I will not deny to plaintiffs the right to ask proper questions along this line now.

Mr. Cluck: Would you step down from the stand then and wait until a little later, Mr. Wiley?

EDWARD CROOKS

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows: [329]

Direct Examination

By Mr. Cluck:

Q. Would you give us your full name?

A. Edward R. Crooks.

Q. By whom are you employed?

A. United Air Lines.

Q. In what capacity? A. Captain.

Q. You are regularly flying now?

A. Yes, sir.

(Testimony of Edward Crooks.)

Q. On what route? A. Seattle—East.

Q. How long have you been flying airplanes?

A. I first flew in 1934.

Q. Could you outline very briefly your aeronautic experience?

A. I obtained a transport license 18 months after my first license; have been barnstorming; started to fly for United Air Lines in 1940; served three and a half years in the Army, Alaskan Division; I have been flying for United Air Lines since my release from the Army. I have held a mechanic's license, do not hold it at the present, however.

Q. What, in brief, was your experience in Alaska?

A. I was chief pilot for one of the division bases in Edmonton, Alberta. We flew all directions, all over Alaska, [330] Canada.

Q. State just in a word your experience as far as flying in icing conditions is concerned.

A. We flew in all types, all kinds of weather in Alaska. The only thing that kept us grounded was 00 weather.

Q. Have you flown DC-3 type aircraft regularly? A. Yes, sir.

Q. You make what are called instrument take-offs regularly?

A. We don't in scheduled operation. We make them as a matter of practice, occasionally; also called to make one every six months for a hood check.

Q. What is an instrument take-off?

(Testimony of Edward Crooks.)

A. You take off entirely by instruments, no visual reference to the ground.

Q. Assuming that a pilot is proficient in instrument flying, is an instrument takeoff dangerous?

Mr. Matthews: Objected to as incompetent, irrelevant and immaterial, there being no evidence in this case that an instrument takeoff was made.

Mr. Cluck: The answer to that, your Honor, is that it would be a matter of choice for the pilot as to whether he managed his takeoff on his instruments or contact. This man, who has had a great deal of experience in instrument takeoffs, can answer very briefly, just answer this single question as to the safety practice in [331] that respect.

The Court: Do you seek to prove in rebuttal by that line of testimony that the pilots in charge of the plane which crashed had available choice of instrument takeoff?

Mr. Cluck: The record itself, and the applicable regulations will show, as a matter of fact, already that they did, your Honor, and we just wanted the record to show, assuming that a pilot is proficient, that instrument takeoffs are regarded as safe procedures. In other words, it is a regularly established aircraft procedure.

Mr. Matthews: I object to that, your Honor. It is incompetent, irrelevant and immaterial, assumes a fact not in issue in this case. There has been no evidence that I know of showing that the takeoff was an instrument takeoff. If there is, I have entirely overlooked it. We asked you in the admis-

(Testimony of Edward Crooks.)

sions, in our requests for admissions, to state whether or not this was an instrument takeoff, and this is stated in your answer to the requests, that you had no way of knowing, everybody was dead and you couldn't find out.

Mr. Cluck: All of that is correct, and I might add just this word as to the application of this, your Honor. Referring back to the point that we think is essential and which we believe is supported uniformly by all applicable cases, the burden of proof in this matter [332] insofar as any issue of negligence is concerned is upon the defendants to show not only that there was negligence, but that the accident resulted from the asserted negligence. Insofar as the manner of takeoff is concerned, no person would know what it was because it would be a matter of inference, but as a part of the evidence of negligence reference was made repeatedly to visibility conditions on the field. Pertinent to that matter is the point which would be covered briefly by this answer, assuming that a pilot is proficient, that an instrument takeoff is provided for in aircraft procedures by which the takeoff is made solely by reference to instruments.

The Court: I think it is within the proper scope of rebuttal. The objection is overruled.

A. Repeat the question, please?

Q. (By Mr. Cluck): Assuming that a pilot is proficient in instrument procedures, is an instrument takeoff a safe procedure?

(Testimony of Edward Crooks.)

A. I would say it would be as safe as a normal takeoff.

Q. You took an airplane off this field that same evening, did you not? A. Yes, sir.

Q. Approximately what time? A. 9:30.

Q. What was the condition of the runway surface at that [333] time?

Mr. Matthews: I object to the question, your Honor, as incompetent, irrelevant and immaterial, what the conditions were at 9:30.

Mr. Cluck: We submit on that that this is just a half hour before the accident in question, and there is no better judge of what the runway conditions were than a pilot who ran a plane down the runway. We can't get it the same instant the other aircraft ran down the runway, obviously, but we can get it as close as we can and then it is a matter of argument as to what weight if any is to be given to it.

The Court: It is part of the same subject involved in the questions objected to with the witness Wiley's rebuttal testimony.

Mr. Cluck: Does your Honor wish to reserve this matter?

The Court: Yes, I do.

Mr. Cluck: Would you wait a few minutes until the reporter has had a chance to check the Court's prior ruling?

Mr. Matthews: Could I ask just one question concerning the testimony as far as he has gone? Did I understand you to say that under scheduled

(Testimony of Edward Crooks.)

operations for the air line by which you are employed you are not permitted to make instrument takeoffs? [334]

The Witness: That is correct.

Mr. Matthews: And you hold what type of license?

The Witness: We hold what is now called an air line transport rating.

Mr. Matthews: Did you know Mr. Chavers?

The Witness: I never met him.

Mr. Matthews: Do you know what kind of a license he had?

The Witness: Only from spectators at the CAB hearing.

Mr. Matthews: Do you know the difference between a commercial license and a transport license such as you have?

The Witness: Well, there has been several changes since they were originally set up. The original setup, all air line pilots had to have a commercial license. We had ratings for the different airplanes we flew, but since the war it has been changed to air line transport rating.

Mr. Matthews: An air line transport rating is a higher type of license than commercial?

The Witness: It is the highest type there is, but you also have all commercial privileges.

Mr. Matthews: Is this rule about making an instrument takeoff which has been adopted by your company the same that has been adopted by the other companies?

(Testimony of Edward Crooks.)

The Witness: I wouldn't say it is the same. It is [335] a company regulation.

Mr. Matthews: Do the other air lines have the same regulation?

The Witness: I am not qualified to say.

Mr. Matthews: Have you ever worked for any other air lines?

The Witness: No, sir.

Mr. Matthews: But your company does not permit you to make an instrument takeoff?

The Witness: Not in scheduled operation.

Mr. Matthews: By scheduled operation, you mean in the carrying of passengers?

The Witness: Yes, sir.

Mr. Matthews: Instrument takeoffs are made only for the purpose of training?

The Witness: As a measure of your proficiency, each six months.

Mr. Matthews: And it is never allowed when you are carrying passengers?

The Witness: No, sir.

Mr. Matthews: That is all.

Mr. Cluck: If the Court please, I was checking over other witnesses, and I am afraid we run into that same point that we did in the case of this last preceding one, so that if it is convenient for the Court, it seems to [336] me we might have the reporter check that now.

The Court: Is there any objection to doing that now? We will be at recess for ten minutes, and I

wish the reporter to bring with her notes concerning Mr. Wiley's testimony.

(Recess.)

(Proceedings read by reporter as follows:)

“Q. Mr. Wiley, what other transport aircraft, if any, took off from Boeing Field within a period of approximately half an hour prior to the accident in question?

“Mr. Matthews: Objected to as incompetent, irrelevant and immaterial to any of the issues in this case.

“The Court: Will you state the purpose of the question?

“Mr. Cluck: Yes, if your Honor please. The matter upon which defendants rely principally as a basis of voiding liability on their policy are conditions of takeoff at Boeing Field. Testimony has been introduced by the defendants as a part of their direct examination relating to weather minimums, including visibility, particularly frost or icing conditions, and so on. We expect to show by this witness very briefly that during the period covered by such direct examination several scheduled and non-scheduled transport aircraft took off from this same runway, at the north end of it, and it seems to us that is a part of the evidence going to show [337] the actual flight conditions on that runway. The presumption would be that aircraft, particularly scheduled air line aircraft, would be observing the law or otherwise would be conforming with safety standards, and it is just a part of

the evidence which the Court can hear and evaluate for what it thinks it is worth after hearing the whole case.

“Mr. Matthews: If the Court please, that would require us to go into the condition of the weather at the time these other airplanes took off. It has already been testified to that weather conditions were extremely variable; that one moment visibility would be one thing, the next minute visibility would be something else. The fact that some other transport pilot did or did not abide by the rules and regulations of CAA doesn’t mean a thing. Some other non-scheduled carrier might have also violated these rules. It seems to me we should confine our inquiry here to the conditions of this airplane at the time it took off, the conditions of weather and visibility at the time this airplane took off, not as to conditions at other times when other airplanes took off.

“The Court: The Court believes that the conditions of flight as affecting safety of takeoff of the plane in question at or about the time it attempted to take off are material, and as to whether or not some particular [338] is more remote than some particular testified to surrounding and affecting the attempted takeoff of the plane in question, that is a matter of weight rather than admissibility, and the Court overrules the objection. Read the question.

“(Last question read by reporter as follows:

‘Q. Mr. Wiley, what other transport aircraft, if any, took off from Boeing Field within a

period of approximately half an hour prior to the accident in question?')

"A. According to my notes here——

"The Court: I do not believe you are authorized to read into the record your notes. You should answer the question if you can.

"Q. You may refresh your recollection, if I may interpose.

"Mr. Matthews: Your Honor, the notes he has is testimony before the CAB, and counsel objected successfully to my even letting the weather woman refresh her recollection. I think under the circumstances, if we are going to apply the same rule, it should be applied to this witness. That is the testimony you gave, wasn't it, that you prepared and gave before the CAA?

"The Witness: Yes, sir.

"Mr. Chuck: If the Court please, the notes that I am referring to were those taken as a regular part of the procedure, irrespective of CAB hearings. The witness [339] testified yesterday that a recording is kept showing the data with reference to takeoff reports on the departures, and he has other data in the tower, and I am asking him not to testify on the basis of what his notes say, but on the basis of what his recollection is, using notes simply as the basis of refreshing his recollection.

"The Court: There is a lack of clarification. The witness has answered a question by Mr. Matthews that the notes to which he actually refers in response to inquiring counsel's advising him

that he may refer to something, is the testimony that he gave before the CAB or CAA. In view of that record, I say that the objection is well taken and is sustained. It does not prevent his referring to official notes. The Court's ruling does not relate to possible notes made by this witness in the course of his work at the time the work was done by this witness.

"Mr. Cluck: In deference to the Court's ruling, we will defer further questions of this witness until we have had an opportunity of checking further on the notes. No further questions.

"Mr. Matthews: No questions.

"The Court: The witness is excused from the stand. Does either side ask to reserve the right to recall the witness?

"Mr. Cluck: Yes, we do, your Honor.

"The Court: The witness will remain in attendance until later excused." [339-A]

The Court: Nothing about rebuttal was said.

Mr. Cluck: I realize that, and it may be, in my assumption, when we talked of recalling the witness, that it would be our own recalling. As I suggested, we are perfectly willing, if counsel prefers, to have them reopen their direct examination so that we may complete it on cross-examination, either way, but the substance of it, we submit, was that we were to have the right to resume questioning and that the principal objection—namely, that the safety conditions, or, rather, the runway conditions and conditions otherwise as observed in

connection with other aircraft departing shortly prior to the accident, was admissible.

Mr. Matthews: Your Honor, it puts us at a disadvantage to re-open our case at this time, after we have excused our witnesses. We are working against a time limit to conclude this case, and I do not believe this is the proper time for counsel—if he wanted to recall the witness, he should have done it at the proper time.

Mr. Cluck: We suggest respectfully that that factor could be removed by the Court's permitting you to examine the witness further in whatever way is reasonable; and as for time, we intend only to take, say, half an hour on all of our remaining witnesses, if matters can just be moved along. [340]

The Court: If you had at the next recess, or asked the opportunity between the calling of witnesses to examine the notes that the witness referred to at the time, at that moment you could have decided whether or not you wished to proceed further to inquire of the witness, and then if that had been done, it might not have involved the defendants in possibly recalling other witnesses who have since been excused. I am certain of one thing, and that is that this subject should not be gone into without the opportunity afforded to the defendants to recall any witness that they previously excused for the purpose of inquiring from him concerning these facts about which you propose to inquire here. If those witnesses are out of reach, it is obviously placing the defendants in an unfair position.

Mr. Cluck: Your Honor, it is perfectly agreeable with us that they recall anyone.

The Court: Suppose there are some of them, it turns out, that they cannot recall. Since the witness has been expressly excused by the Court, he may have placed himself beyond the reach of a telephone call, and it is now 3:15 in the afternoon, and it certainly offers some practical disadvantages. I do not believe what was contemplated at the time was saving this question for rebuttal. [341]

Mr. Cluck: Is there any showing made, your Honor, that there would be any witnesses that could not be made available?

The Court: No, there is not, but I am asking about that and I ask Mr. Matthews to respond as to whether or not there is any witness that is unavailable now on this subject that would have been available if this matter had been disposed of at the time.

Mr. Matthews: All the witnesses we had that were at the field at the time this plane took off at this particular hour have been excused, and none of the witnesses that are here now—in fact, the only witness that we have not excused and have asked to remain here is Mr. Greenley, who was not here at that time, so far as I know.

The Court: I am sorry Mr. Cluck may have put a mistaken construction upon the situation, but at the same time, from the standpoint of the other side, it is easily prejudicial. I think the Court ought to sustain this objection, and that is the order, in

view of the circumstances, particularly the way it arose.

If the witness Wiley had been recalled within a few minutes, as soon as an opportunity could have been had to look at those notes, that is, as soon as an opportunity could have been extended to Mr. Cluck to look at those [342] notes and consider the matter further, then there could be no prejudice resulting to the defendants except insofar as there was a possible error in the Court's view that it was proper cross-examination.

Mr. Cluck: If the Court please, I rather think there is a further reference to this same point in connection with one of the other witnesses, which we will check with the court reporter at the first opportunity when the session is over, but apart from that, we would like to make an offer of proof very briefly for the record.

The Court: You may do that.

Mr. Cluck: We offer to prove by the witness Robert Wiley that during the period of one-half hour immediately preceding the accident in question, several scheduled and non-scheduled passenger aircraft took off from the north end of the runway at Boeing Field under conditions of safe operation.

We offer to prove by the witness Crooks that about 9:35 he, as a captain on one of the United Air Lines' planes, took off from the north end of the runway at Boeing Field; that the runway surface at that time was not unusually icy; that he could apply brakes on the plane even while the motor was being run up prior to take-off without

substantial slipping or skidding; that he could see the lights along both sides of the runway [343] clearly on down either to the end or substantially to the end of the runway; that he made a contact take-off, not an instrument take-off, and that the take-off was made without any unusual difficulty and with complete safety. We offer to corroborate that evidence by the co-pilot, Mr. Popham.

We offer to prove by the witness Strobel that as captain on an Air Transport Command aircraft, just a few minutes after the United flight I mentioned, that he took off from the north end of the same runway and found substantially the same conditions as were summarized and observed by Mr. Crooks.

Mr. Matthews: That is objected to for all the reasons heretofore stated, your Honor.

The Court: I think for the record you should state them more specifically at this time.

Mr. Matthews: That is objected to for the reason that it isn't proper rebuttal. We did not, in our case in chief, inquire into the take-off of any other airplanes that took off 35 or 40 minutes before this airplane did. Proof of weather conditions, what could be seen or what could not be seen 35 or 40 minutes before this plane took off are incompetent and immaterial and of no probative value in proving what the visibility was when this plane took off at 10:05 or 10:07 that evening. [344]

Furthermore, that with the permission of the Court we have excused from this hearing all of the witnesses that we have subpoenaed to be here that

we might possibly use to describe what conditions were at 30 or 40 minutes before this plane took off. I believe that is all.

Mr. Cluck: I have a supplemental offer of proof, your Honor, that I would like to add. We offer further to prove by the witness Robert Wiley that immediately prior to the take-off of the aircraft involved in this accident, that he was in the tower and while in charge of giving clearance for take-off to this and other aircraft, he was in direct communication with Chavers as the pilot of the aircraft involved in the suit, that substantially the following occurred in respect of the clearance for take-off.

Mr. Matthews: If the Court please, I believe this is on an entirely different subject.

The Court: Was this gone into with the witness Wiley before? Was there any objection made on the ground it was hearsay?

Mr. Matthews: Yes, it was objected to on the ground that it was hearsay.

The Court: The Court should hear the offer, however, and will do so at this time.

Mr. Cluck: That substantially the following occurred, [345] which Mr. Wiley is prepared to testify from his own notes without reference to the CAB hearing: that after the tower, that is, after Mr. Wiley had informed him, Chavers, that he, Chavers would be advised of any change of visibility, the pilot acknowledged that statement and said in substance that he, Chavers, could see the green range lights at the other end of the runway, mean-

ing the opposite or south end of the runway approximately five thousand or more feet away.

Mr. Matthews: Are you reading?

Mr. Cluck: No. I am making an offer of proof. After which Mr.—

Mr. Matthews: Mr. Cluck, are you not now reading from a transcript of testimony that was made up partly from a record and partly from what the pilots could recollect, which was offered in evidence at the CAB hearing, and is a part of this record that I hold in my hand which you have consistently objected to my using? Is that not what you are reading from now?

Mr. Cluck: Would you permit me to answer the question? The answer is in my statement of offer of proof I am not stating anything in anything that I am referring to. I am paraphrasing what occurred as we are prepared to prove through the witness Wiley from his own notes, independent of the CAA hearing. I submit what may be referred to [346] in connection with the preparation or presentation of the case in our own affair.

We offer to prove then that he, Wiley, in reply to that report concerning the range lights at the opposite end of the runway stated in effect that the visibility was improving; that he, Chavers, in reply reported to the tower that he, Chavers, could still see the green lights at the opposite, meaning the south end of the runway, and that he was going to take off; that the tower, in response to that, said in effect that he was cleared for take-off and that the pilot should report when he got on top.

Mr. Matthews: If the Court please, we object now, as we did when Mr. Wiley was on the stand before, to statements made by Mr. Wiley, hearsay statements of what he heard over the radio, which he believes statements made by Mr. Chavers, upon the grounds and for the reason that that would be hearsay and afford us no opportunity of cross-examination; that the offer is not timely made; does not give us an opportunity to rebut the offers of proof; that this whole matter was before the Court and was disposed of by the Court, the same record at that time being referred to, and the Court has already ruled upon the admissibility of this evidence.

Also, as to the portion thereof which refers to the [347] tower man giving a clearance to take off, it is not admissible or material to any issue in this cause because under the rules and regulations of the CAA the tower man only clears an airplane for other traffic on the field and does not clear the airplane for weather conditions, but the pilot, as far as weather conditions, takes off solely on his own responsibility and the tower man does not attempt to control his take-off, nor does he have any right or authority to do so under the CAA regulations; and I think also it is only fair, when counsel is referring to that statement, that he omitted the fact that the tower man as a part of that conversation, since I think he is indirectly trying to influence the Court with that record, the tower man told Mr. Chavers that the visibility was below minimums and if he took off he would be in viola-

tion, and I believe that the offer is not timely made and it is incompetent, irrelevant and immaterial to any issues in this case.

The Court: The objections are sustained.

JAMES A. COOK

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows: [348]

Direct Examination

By Mr. Cluck:

Q. What is your full name?

A. James A. Cook.

Q. Where do you live now?

A. General Delivery, Dash Point, Washington.

Q. By whom were you employed about January 2, 1949?

A. I was employed by myself at Pasco, Washington, at that time.

Q. Did you have occasion to come over to Boeing Field at about the time of the accident that you have heard testimony about here?

A. Yes, sir.

Q. How did you happen to come over?

A. I was called shortly after the accident and asked to take the first available method of transportation and come to see if I could help out.

Q. Did you have occasion to examine the tracks made by this airplane as it went down the runway?

A. Yes, sir.

Q. Just describe briefly what they were.

Mr. Matthews: Your Honor, before the witness

(Testimony of James A. Cook.)

answers that question, may I ask a couple of questions to bring out the capacity in which he was acting?

The Court: Does it relate to the question [349] of admissibility of evidence?

Mr. Matthews: Yes, it does, your Honor.

The Court: It is difficult for me to see that offhand, but you may interrupt for the purpose of asking qualifying questions.

Mr. Matthews: Were you appointed and did you serve as part of a committee selected by the Civil Aeronautics Board consisting of Leon D. Cuddeback, Louis C. Muggee, William A. Glen, Lyle L. Lucklichtner and yourself for the purpose of investigating the tracks made by this airplane?

The Witness: Yes.

Mr. Matthews: Did you make a written report to the CAB in connection with this investigation of this accident which was signed by yourself and the other gentlemen mentioned?

The Witness: Yes.

Mr. Matthews: Is the knowledge that you have of the tracks—was it obtained by you as a part of your duties as a member of that committee?

The Witness: Yes.

Mr. Matthews: In connection with the investigation being carried on by the Civil Aeronautics Board?

The Witness: I was asked by a member of Seattle Air Charter to take part on that board as their representative. [350]

(Testimony of James A. Cook.)

Mr. Matthews: And the Civil Aeronautics Board wanted a representative of Seattle Air Charter on the board and you were selected?

The Witness: As far as I know, sir.

Mr. Cluck: I will ask a question or two, and then I would like an opportunity to answer the objection.

Q. (By Mr. Cluck): You were never employed by the CAA, were you? A. No, sir, never.

Q. When you spoke of investigation, you were speaking of a group that were examining the tracks, is that true? A. That is true.

Q. It was composed of whom?

A. Of Mr. Cuddeback of the Civil Aeronautics Administration, I believe there was Mr. Mugge, Mr. Glen, if I remember correctly, Mr. Lucklichtner of the Seattle Air Charter, and myself.

Q. You have never been connected officially with the Civil Aeronautics Board? A. Never.

Q. You were simply asked to go out and join this group in looking at those tracks?

A. Yes, sir.

Mr. Cluck: If your Honor please, counsel for defendants, among other witnesses, called Mr. [351] Cuddeback who testified to certain matters from his direct recollection, and even though some of them were included in the report, we didn't, as I recall, make objection as long as it was from his direct knowledge.

Mr. Strong, the instrument man, made a detailed examination of the wrecked airplane and he like-

(Testimony of James A. Cook.)

wise testified concerning that, and as long as he didn't cover matters set forth in the hearing, that is, as long as he offered statements as his own direct knowledge, that was permitted to be introduced.

In the case of this witness, all we are asking him to do is something that is called for in the interests of accuracy, if nothing else, and that is to say in substance, what he observed in connection with the tracks on the runway, and the man who is the best able to testify what they were is, of course, the man who carefully observed them immediately after the accident occurred.

Mr. Matthews: Your Honor, the testimony of Mr. Strong was offered, it is true, and no objection was made because counsel thought that there was some part of that testimony undoubtedly which was beneficial to him. The same thing was true of Mr. Cuddeback's testimony.

Our position on the CAB hearing is this, we are perfectly willing to have all of it go in, and we have tried to get it in, perfectly willing that all of the [352] evidence go in at the CAB hearing and findings, but counsel has—any part of that evidence which we thought was beneficial to us, counsel has successfully kept out, even to the point of prohibiting me from asking a witness if he didn't make a statement to a certain effect in connection with the investigation, a witness who wasn't a member of that committee, didn't occupy any official position of any kind, so that the mere fact

(Testimony of James A. Cook.)

that as to some of our offer counsel didn't object for reasons sufficient to himself, but we were prevented consistently from getting in any part of that hearing which was beneficial to us, and then to come along in rebuttal at this time and offer this testimony, it seems to me it is not admissible under what has been the consistent ruling of the Court.

Had counsel objected to the report of Mr. Strong, the Court would have excluded it, just like it excluded numerous other documents that were used in connection with the Civil Aeronautics Board hearing. Furthermore, again I say this is not the proper time to bring this up, in rebuttal.

Mr. Cluck: If the Court please, I certainly wish to correct counsel's statement of fact. If we go down the list of witnesses called by defendants in this case, it will be found that with very few exceptions every one [353] of them testified at the CAB hearing, every one of them except possibly two or three that I can recall offhand, and we did not object to their testimony as long as they stayed clear of what occurred at a hearing where we had no opportunity to cross-examine witnesses or even to have witnesses of our own. Their testimony, when it was submitted on the basis of their direct knowledge, was put in without objection on our part. I wish that understood, and if there is any disposition on the part of counsel to deny it, I will read one by one every one of those witnesses and prove with just two or three exceptions that has been

(Testimony of James A. Cook.)

the case. In this instance, we are, as we said, simply asking the witness from his direct knowledge what the tracks were. That is all, we are not referring to the hearing.

The Court: What have you to say against the objection that it is not proper rebuttal?

Mr. Cluck: Just this, your Honor, we keep in mind that the prima facie case that plaintiff made covered the matter, such matters as the policy having been in effect, premiums having been paid, what happened as far as the salvage of the aircraft is concerned, and other matters of that nature.

Counsel in his answer raised for the first time the issue of negligence and related points relied upon to [354] void liability on the policy, and up to this time those matters have been covered by their own witnesses and we have simply cross-examined them. Since 1 o'clock has been our first opportunity to call our own witnesses to cover the issues which were raised initially in the pleadings by way of affirmative defense, and then by way of their own testimony in part of their case in chief.

It is respectfully submitted that testimony with regard to such basic data as the tracks made by the airplane involved in the accident to the extent that they support our theory that there was no showing of negligence and relationship of alleged negligence and damage that that is directly pertinent. It is about as pertinent as any other evidence would be, because it is physical evidence. It is evidence that

(Testimony of James A. Cook.)

is used as a starting point on the part of anyone seeking to arrive at cause and effect.

Mr. Matthews: No inquiry was made concerning these tracks as a part of our case. Therefore, I submit it is not rebuttal, and the other three witnesses, Mr. Cuddeback, Mr. Mugge, Mr. Glen, who were on this committee have been excused by the Court as witnesses with the consent of counsel, and Mr. Lucklichtner, the last information I could get concerning him, he was down in Florida. I think certainly, having not been gone into [355] as a part of our case or as a part of plaintiffs' case, it is not proper rebuttal. It opens up a whole new field, a whole new theory which was not gone into in our case or theirs.

Mr. Cluck: In reply, briefly, we submit that having raised the issue of negligence, counsel cannot by limiting their direct examination automatically deprive us of all opportunity of submitting our view of what occurred. While he had his witnesses on in direct examination, our right of cross-examination covered only the matters which he covered, and several times he raised objection concerning the scope of our direct examination, and two or three times the objection was sustained on the ground that we were seeking to enlarge the scope of the subject matter which he had covered.

My recollection is that he submitted no witnesses who testified directly on the matter of the tracks made by the aircraft, and if we at that time sought to cross-examine he could have successfully raised

(Testimony of James A. Cook.)

the objection, so this is the first time we can inquire about it.

The Court: May I ask you, Mr. Cluck, on what theory do you contend that the evidence as to track marks of the plane which crashed will tend to negate the allegation and proof as to negligent operation of the airplane?

Mr. Cluck: In this respect, your Honor, the negligence [356] relied upon, alleged and to the extent there is anything offered in the way of proof at all, relates to the matter of icing and of overloading. There was some reference to visibility. The point that has been covered by expert witnesses, even those called by the defendant, has been to the effect that neither icing nor overloading even if it existed, would deprive a pilot of the directional control of the aircraft prior to its flight. In other words, even if the aircraft is overloaded or even if there is ice on the wings, still he could prevent it from going left off the runway.

This witness examined the tracks and we intend to show that at a distance of approximately 1100 feet from the north end of the runway the plane began to describe a curve of about 35 degrees until a point approximately 1800 feet from the end of the runway, when it first became airborne, and if that is correct, it means that nothing relating to either overloading or icing could possibly be pertinent to this matter, because it could not, by the defendants' witnesses' own admission, explain the cause of that aircraft starting the direction which

(Testimony of James A. Cook.)

finally led it to the crash. It is quite an important point and could be covered in very brief testimony.

The Court: Have you sufficiently stated your position, [357] Mr. Matthews?

Mr. Matthews: I think so, your Honor.

The Court: The ruling is that the objection is overruled upon condition that no written report made or signed by this witness, which became an integral part of the factual data reflected by the CAB report, may be inquired into of this witness.

Q. (By Mr. Cluck): Would you answer the question?

A. Briefly, those tracks started at the north end of the runway and continued for approximately 1050 feet in a direction straight down the runway. The tracks at that point disappeared and were again visible just short of 1800 feet down the runway, and when they appeared again they were in a slight curve to the left, a very gradual and continuous curve, and just before reaching the edge of the runway the tracks disappeared entirely, and I don't recall the exact distance that was measured there, somewhere approximately 15 or 18 feet off the runway, there was a mark that we were able to find where the left wing had started to drag.

Q. I am just asking you about the runway at the present time, Mr. Cook. In short, the plane left the runway on the left side, is that correct?

A. On the left side of the runway, yes, sir.

Q. Describing a curve of about how many degrees?

(Testimony of James A. Cook.)

A. The curve itself, I don't know how many degrees it [358] would be. The angle from the runway would be approximately 35 degrees.

Q. Had you flown this same plane involved in the accident? A. Yes.

Q. Where is the control of the automatic pilot located?

A. It is located behind the co-pilot on the right-hand side of the companionway, in other words, the entrance to the pilot's compartment. It would be just back of the co-pilot on the corner of the companionway.

Q. Did the plane become airborne after the wing dragged? A. Yes, sir.

Mr. Matthews: I object to that question; the witness was not present.

Q. Putting it another way, were there any markings at the end of the drag line you mentioned?

A. No. There was a distance of some, as I recall, 750 feet without any mark whatsoever.

The Court: After the drag mark?

The Witness: After the wing tip dragged, yes, sir.

The Court: About how many feet?

The Witness: As I recall, about 750 feet.

The Court: What did you say about that distance?

The Witness: There was no mark whatsoever.

Q. (By Mr. Cluck): In connection with the automatic pilot, could you describe in a word what the procedure is on that [359] prior to take-off?

A. That would vary. In some cases, pilots check

(Testimony of James A. Cook.)

the auto-pilot through before take-off and then turn it off afterwards. This is not always done, however.

Q. Can you speak a little louder?

A. In some cases, the auto pilot is checked through before take-off, but this is not always true.

Q. What is the heading to Ellensburg?

A. I would say approximately 90 degrees from Boeing Field.

Q. If you were flying it? A. Yes, sir.

The Court: How did you fix the 90 degrees, with reference to what? We are not all fliers.

The Witness: That would be the compass heading, sir.

The Court: You may proceed.

Cross-Examination

By Mr. Matthews:

Q. Did you come over here especially for this trial from your home, or are you living here now?

A. I am living in Tacoma now.

Q. Since you served on this committee, have you had any occasion to refer to the report which was made concerning these tracks and the distances and the measurements? A. None whatsoever, sir.

Q. Can you recall any other tracks that were made [360] or the distance of them besides the ones you have told us about?

A. The tracks further took up at the end of this space I mentioned. As I recall, there was about 750 feet, then there was a touchdown mark of what we took to be the tail wheel.

(Testimony of James A. Cook.)

Q. I just asked you if you could recall any other tracks? A. Yes.

Q. Have you been shown a copy of this report since you came over here? A. No, sir.

Q. You have not looked at it?

A. I have seen no report since I came over here.

Q. Have you looked at a map?

A. Yes, sir.

Q. Is it your testimony, sir, that after all this lapse of time you can carry in your memory and in your own mind and in your own independent recollection all of these distances and angles of curvature that you have described here?

A. I refreshed my memory with the map. However, I differed with some of the distances on it, as I recalled them, and I used the distances I remembered myself rather than those on the map.

Q. Did you make any notes that you kept in your possession? A. No, sir. [361]

Q. Has your testimony been refreshed to some extent by an examination of the map and your discussions with Mr. Cluck concerning this report?

A. The examination of the map, yes, sir.

Q. Do you think that independently of that examination, your discussions with Mr. Cluck, you could have given this testimony you have given here today?

A. I think I could just about have drawn that map without even looking at it.

Q. You said that you saw some tracks that

(Testimony of James A. Cook.)

started 1050 feet from the north end of the runway, is that right?

A. No, sir. I said that the tracks that were determined to be those of 79025 started at the beginning of the runway take-off and of the runway and continued approximately 1050 feet down the runway.

Q. Could you see those tracks?

A. Yes, those tracks were definite.

Q. From the north end of the runway down to 1050 feet?

A. We stepped it off. It was roughly 1050 feet.

Q. I do not want to confuse you. It is your testimony you could follow the tracks from the north end of the runway south 1050 feet?

A. The way we determined those tracks was by backtracking.

Q. I am not asking you how you determined it. I am asking you if you could find any tracks from the north end [362] of the runway down to a point on the runway 1050 feet from the north end?

A. The tracks were evident for that entire distance, yes.

Q. If I would tell you that that is contrary to the statement of everybody else that is on the committee that served with you, would you still say that is true?

A. As I recall it, sir. That has been a long time, but as I recall it we could see those tracks.

Q. If I would say to you that every other member of that committee who signed the statement said

(Testimony of James A. Cook.)

there were no tracks that could be identified or visible from the north end of the runway down to a point 1050 feet, you still claim there were?

Mr. Houghton: Your Honor, I object to that question. This witness does not have to square his testimony with somebody Mr. Matthews may compare it with. It is improper cross-examination, an improper question.

The Court: I do not think it is proper to ask one witness those beliefs. If this data you mentioned was already testified, I do not think you could ask him whether or not it is true, and that is about what you are doing. I think the objection should be sustained. Also, I am not so sure it does not refer to a record. You speak of a record which may be part of the report.

Mr. Matthews: I do not want to circumvent the Court's ruling, but at this time I would like to ask permission [363] to impeach this witness by calling his attention to a signed statement which——

The Court: Which he made?

Mr. Matthews: Which is directly contrary to the evidence he has given.

The Court: If the statement was signed by him, the request will be considered. If the statement is signed by someone else——

Mr. Matthews: It is signed by him.

The Court: Is there any objection to showing him a statement signed by him for the purpose of impeachment?

Mr. Cluck: Your Honor, we have no desire to

(Testimony of James A. Cook.)

have anything but admissible facts on this matter, and in the interests of doing so, I respectfully request a recess of five minutes to confer with counsel immediately on this matter.

Mr. Matthews: I think we should conclude with this witness. This is a very critical point in the testimony.

The Court: Let each counsel consult with each other as to what that document is.

Mr. Cluck: I have not seen the statement or anything else you intend to use by way of impeachment.

The Court: Let opposing counsel see the signature you intend to show him. The Court will indulge an interruption for that purpose, Mr. [364] Matthews.

Mr. Cluck: If the Court please, sometimes candor is one way of disposing of a problem, even though it may not fall strictly within some rule. We frankly believe that there is——

Mr. Matthews: May I make a suggestion? If you are going to now state to the witness what is in this report, I think he should be excused from the room.

Mr. Cluck: No, I shall not. We frankly believe the witness has made a mistake in testifying on this matter, and we state in complete frankness that we are willing that the testimony be stricken on this subject of tracks, and we shall then if the witness is available offer to establish the tracks by one of the other men who observed them.

(Testimony of James A. Cook.)

The Court: Have you any objection to striking the testimony?

Mr. Matthews: No objection, your Honor.

The Court: All of the testimony of this witness relating to the tracks of the airplane in question is stricken and the Court will disregard it. This is done at the request of plaintiffs' counsel.

Mr. Cluck: May we have five minutes, your Honor? I want to see if another witness is available.

The Court: Will you let me know if there is any further interrogation desired of this witness? He is [365] just excused from the stand. You may be excused. We will take a five minute recess.

(Recess.)

Mr. Cluck: If the Court please, we have this problem. I am going to tell the Court what it is and then make a suggestion which I think is reasonable. Earlier this afternoon we had Mr. Mugge here, who was one of the men that examined these tracks for the CAB. We asked him what the tracks were, and objection was made by the defendants on the ground that that covered matter referred to in the reports of the CAB.

Since then the matter has been gone into in connection with other witnesses, and as I understand it, the Court's ruling is that if a witness, even a witness connected with the CAA, answers a question on the basis of his independent personal recollection without any reference whatsoever to any matter

contained in a CAB report or any data he supplied any report he may have made to the CAB, that he may do so.

After that witness was here, we excused him because we thought Mr. Cook knew the tracks. We did not have the opportunity to confer about it with him because we had supposed Mr. Cook would be the witness to testify on that. Now that Mr. Cook recalls, as we believe, incorrectly what they were, we suggest this procedure: we have [366] only one witness left, Mr. Culliton, to give very brief testimony on another point that will take until, roughly, 4:20. We have had in mind from the beginning, with long briefs here that are about to be served on our part, and I am sure on the part of defendants, that if both sides exchange them and file them with the Court, we could then present argument tomorrow morning. That was part of the original schedule. If we were permitted to recall Mr. Mugge for the brief testimony only on the matter of what these tracks actually were, we think it would take ten minutes at most and not disrupt the schedule to any greater extent than that.

The Court: Who has been familiar with the places and methods of getting in touch with Mr. Mugge?

Mr. Cluck: He is down at the field, your Honor, and it would be a matter simply of telephoning him and asking him to come up. He could be here in half an hour but I am afraid it would be that long with the traffic.

The Court: Let someone connected with the case try to contact Mr. Mugge and come back with a report. The Court is making no promise to hear any testimony tomorrow morning. It has been my intention to work at this trial until testimony is completed, and I wish whoever can do this would try to get those witnesses here this afternoon. If they can get here in half an hour, the Court will wait [367] until they get here.

Mr Cluck: Mr. Houghton is checking on it.

ROBERT CULLITON

called as a witness by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cluck:

Q. Would you give us your full name?

A. Robert J. Culliton.

Q. Where do you live?

A. In Bellevue, Washington.

Q. What is your business?

A. I am an insurance broker.

Q. With what firm are you connected?

A. With Culliton & McDonald, Inc.

Q. Here in this city? A. In Seattle.

The Court: How do you spell McDonald?

The Witness: M-c-D-o-n-a-l-d.

Q. You had dealings with Mr. Leland in connection with the policy that is the subject matter of this suit? A. I did.

(Testimony of Robert Culliton.)

Q. State whether or not Mr. Leland informed you concerning [368] his application for an extension of time from the CAA within which to comply with a special regulation relating to installation of fire-resistant material in the aircraft?

Mr. Matthews: Objected to upon the ground and for the reason that this witness has stated that he is a broker, and therefore under the law of this state he is an agent of the insured and not an agent of Lloyd's of London, and I am sure I can develop that more fully if the Court would permit me to ask him one or two questions about his relationship.

The Court: The Court will need your development of the law before we finish consideration of the subject. Mr. Cluck, have you any objection to this inquiry by Mr. Matthews?

Mr. Cluck: I might ask one or two more questions, your Honor. This is the same subject matter covered by Mr. Sweet this morning.

Q. (By Mr. Cluck): Have you had arrangements with D. K. MacDonald & Company in this city with respect to servicing of a policy held by Mr. Leland on the aircraft that is the subject matter of this accident?

A. Mr. Cluck, I don't have any arrangements with D. K. MacDonald & Company. I buy insurance through D. K. MacDonald & Company.

Q. Put it another way, what was the practice—was there [369] an established practice with respect to the insured taking up with you information or

(Testimony of Robert Culliton.)

problems which were to be cleared either with you or with D. K. MacDonald & Company after the policy was purchased?

A. Mr. Chuck, the relationship is as follows: I am the broker. I buy the insurance in London through D. K. MacDonald & Company, who are surplus line brokers. Mr. Leland would do all of his insurance business with me, not with D. K. MacDonald & Company. Does that answer your question?

Q. Partly. After the policy is purchased, it has been frequently the case that clearances of one kind or another had to be secured by the insured under it, is that true?

Mr. Matthews: Objected to as leading and suggestive.

The Witness: Yes, changes take place.

The Court: The objection is overruled.

Q. What has been the practice—what was the practice in that respect prior to this accident?

A. If there was any change necessary in the coverage on the aircraft, Mr. Leland would discuss it with me and ask me or direct me to make those changes. I in turn, after the changes were decided upon, would go to D. K. MacDonald & Company and ask them to make the changes.

Q. Did D. K. MacDonald & Company have any direct relationship with the insured with respect to such changes, or did they utilize your services as intermediary? [370]

A. D. K. MacDonald & Company had no direct connection with the assured.

(Testimony of Robert Culliton.)

Q. The assured would always take up such matters with you? A. Yes, sir.

Q. And that had been the established practice for how long?

A. I believe that has always been the established practice with what we call Lloyd's open market placements.

Q. Is that the case with all the assured here in this area? A. As far as I know, it is.

Q. And such matters then are cleared usually by telephone?

A. Generally telephone or by word of mouth, whichever is most convenient.

Q. Did Mr. Leland take up with you the matter of his having secured a time extension for complying with a special regulation relating to fire-resistant material?

Mr. Matthews: Same objection, on the ground the policy provides that there will be written consent from D. K. MacDonald & Company.

Mr. Cluck: This was gone into at the time Mr. Sweet was on the stand this morning. It will be recalled counsel called him in connection with matters relating to handling of this policy by D. K. MacDonald & Company, and that upon cross-examination Mr. Sweet testified to [371] this in substance: He said after a policy was once sold to an insured, that D. K. MacDonald & Company utilized the services of Culliton & McDonald, with which the witness now on the stand is connected, that the assured would always take up through

(Testimony of Robert Culliton.)

Culliton & McDonald any problem and clear with respect of furnishing any required information, and that D. K. MacDonald & Company had that as a settled practice, both with the assured and with Lloyd's, and that that was invariably, or that that was the regular practice followed with all assured.

The purpose of this question is simply to show that Mr. Leland followed that established practice in connection with clearance on this particular matter. We realize, and counsel, of course, is correct in stating that there is a statement in the policy to the effect that there should be a written notice, but we submit, and I doubt that counsel will deny, that the law is quite well settled that where there is the required business relationship between the parties, that oral notice given to one properly authorized with knowledge on the part of the insurer complies substantially enough with the requirements of the policy and is uniformly taken as compliance in respect of any contention that liability should be voided under it.

The Court: Is there anything else to be [372] said?

Mr. Matthews: I think not, your Honor.

The Court: Where is the clause in question in the policy which speaks of the requirement of written consent?

The Witness: Your Honor, can I show it to you?

The Court: The witness says he knows where it is.

Mr Cluck: Paragraph 1(c), your Honor, under

(Testimony of Robert Culliton.)

general exclusions, reading as follows: "This Certificate and/or Policy does not cover:"—skipping down to 1(c)—"The use of the Aircraft for closed course racing, or student instruction unless such use is specifically approved in the Schedule, or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of D. K. MacDonald & Company for Underwriters."

It will be recalled we contend this provision is inapplicable for other reasons, but it is pertinent to the issue raised, while written notice might have been given, that oral notice was.

The Court: I am going to hear the testimony, and that does not keep the Court from considering the contentions of each side after the testimony is in as to whether or not it may be evidence in contradiction of that term for some reason considered by the Court as accomplishing a fact inconsistent with the one there stipulated a fact or a result inconsistent with the one [373] there stipulated. That is a matter for the Court to determine as a matter of law, it seems to me, later. The objection is overruled.

Q. (By Mr. Cluck): Will you state what Mr. Leland said or did, Mr. Culliton, in connection with notifying you concerning the extension of time for compliance with that special regulation?

Mr. Matthews: Same objection.

The Court: Overruled.

(Testimony of Robert Culliton.)

A. Mr. Leland mentioned to me that it was necessary for him to make some structural changes, I am not familiar with exactly what they were, something to do with the fire wall in his aircraft. Those came up not in the usual manner. I was simply discussing general things with Mr. Leland when it came up. I have no knowledge of the technical order at all, except I was familiar with the fact that there was some structural change necessary in the aircraft, and that Mr. Leland had an extension of time in which to accomplish this.

The Court: I do not understand the witness' testimony. I do not understand whether he is stating as to what his understanding was or what Mr. Leland said or what it is he has just related. You may inquire further.

Q. Mr. Leland mentioned to you, as I understood you to testify, that he was getting a time extension from the CAA in order to comply with some order relating to installation [374] of fire-resistant materials? A. Yes, sir.

Mr. Matthews: I think that is very leading and suggestive. He said before a fire wall. I do not think you should lead the witness.

The Court: The objection is sustained. Find out from the witness what was said.

Q. State in your own words what was said by Mr. Leland as far as you know it.

A. In the first place, the question came up not because of any insurance question, but simply I happened to be talking about money. Mr. Leland

(Testimony of Robert Culliton.)

mentioned that these changes were necessary, that they would cost some money, and that he had an extension of time in which to complete the necessary changes.

Q. What was the general nature of the changes that he was referring to?

A. He mentioned insulating material changes of some sort. I didn't go into it with him technically at all.

Q. Relating to fire? A. Yes, I think so.

Q. He did refer to——

Mr. Matthews: Don't lead him.

The Court: Ask him.

Q. What did he say with reference to the CAA regulation?

A. It was my understanding that all—— [375]

Mr. Matthews: Just what did he say.

The Witness: He said all planes of this type, this DC-3, had to make these changes within a certain length of time and that he was planning to make the changes and that he had an extension of that time.

Q. From whom?

A. From the authorities. I don't know whether he said CAA or CAB, but from the necessary authorities.

Q. Approximately what time did you have this conversation with him?

A. I wouldn't even attempt to say at what date this conversation took place. I saw Mr. Leland, of

(Testimony of Robert Culliton.)

course, three or four times a week for two years preceding this crash.

Q. Approximately how long was it before his death, as far as you can recall?

A. I would much rather not pin it down to any definite time, because it could have been six months and it could have been a month.

Q. We are not attempting to pin it down to any special day, but using the date of the death as a time——

Mr. Matthews: Don't suggest a date to him, counsel.

Q. From the date of death, can you estimate the approximate time when the matter was brought up?

A. I would much rather not, Mr. Cluck. I do not know at all. I can't give you any definite date. I don't [376] connect it with anything because I didn't at the time.

Q. Was it any less than a month prior to the date of his death?

Mr. Matthews: The witness has answered he doesn't know.

Mr. Cluck: He said it might have been a month to six months. I am trying to make it clear it was within that period.

The Witness: I would like to be able to give you an exact date, but, as I say, I contacted Mr. Leland many, many times for two years prior to this, and I really can't say when it was I talked to him about it.

Mr. Cluck: That is all.

(Testimony of Robert Culliton.)

Cross-Examination

By Mr. Matthews:

Q. Are you an agent of the underwriters of Lloyd's of London? A. No, sir.

Q. Have you ever been? A. No, sir.

Q. Are you an agent of the Eagle Star Insurance Company, Ltd., or the Orion Insurance Company, Ltd., or the Drake Insurance Company, Ltd.?

A. No, sir.

Q. Have you ever been given any authority by any of [377] those companies to change any of the terms or conditions of the policies which were issued by any of them? A. No, sir.

Q. In any of your dealings with D. K. MacDonald & Company have they ever authorized you to make any changes in the terms and conditions of any policy which you may have bought through them and your customers? A. No, sir.

Q. State whether or not it was necessary for you, if there was to be a change made in the terms of the coverage, to obtain that consent from D. K. MacDonald & Company in the same manner which the assured would have to obtain it if he wanted such a change?

A. I am not positive of your question there. Would you restate it, please?

Q. If you desired some change in the coverage, would it be necessary for you to advise D. K. MacDonald & Company what the required change was?

A. Yes.

(Testimony of Robert Culliton.)

Q. Then what would happen?

A. Then it was my understanding that D. K. MacDonald & Company would communicate with Lloyd's of London and ask for any changes that were necessary, and in turn confirm or reject as the case might be those changes.

Q. Did you ever represent to Mr. Leland that you were [378] an agent of D. K. MacDonald & Company or an agent of any of these defendant insurance companies I have mentioned?

A. No, I never represented that.

Q. Do you think he fully understood what the relationship was between you and D. K. MacDonald & Company such as you have explained here today?

A. I am positive he did.

Mr. Matthews: That is all.

Mr. Houghton: Your Honor, I might report I have talked with Mr. Mugge on the telephone and told him you suggested you would like to have him down here as soon as possible. He said he would start right down and try to make it.

The Court: The Court will be at recess, if that is needed at this time, in order to accommodate that witness. In the meantime, before calling a recess, is there anything else counsel or any one of the witnesses——

Mr. Wilkerson: I have a brief supplemental memorandum on one subject which may be considered by the Court. I will serve it on counsel.

Mr. Houghton: We also have a brief. I might say, your Honor, in this brief you will find a couple

of little changes made with a pen since I have been here. It was delivered to me and I found a couple of corrections that needed to be made. I beg your pardon for making them in [379] that way.

The Court: That is agreeable.

Mr. Matthews: Your Honor, there is only one matter that I would like to take up with the Court at the first convenience in connection with the offer of proof that was made by Mr. Cluck concerning the take-off of the non-scheduled carrier which took off some thirty minutes before the airplane which is the subject matter of this litigation. I would offer to prove, if that evidence was admitted, that the pilot of that plane was charged with a violation of the CAA regulations and paid a fine of \$300 for taking off from the airport under weather conditions where take-off was not permissible.

The Court: The Court sustained the objection to the offer of proof, did it not?

Mr. Cluck: Yes, the Court did, your Honor. That statement invites a reply. I will refrain from making it except to say that the pilot we offered, to reply to that by showing that the pilot paid it as a settlement simply because he did not have witnesses to show that the weather was as he found it, and solely for that reason.

Your Honor, Mr. Strong is here now. That will be our only witness before Mr. Mugge comes.

The Court: The witness Strong has been recalled. He has previously been sworn. He may now be interrogated. [380]

LAWRENCE STRONG

called as a witness by and on behalf of plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cluck:

Q. Give your full name again just for the record. A. Lawrence J. Strong.

Q. If the automatic pilot in an airplane is operating, when does it take effect during the course of the take-off run?

A. If it is operating in the on position——

Mr. Matthews: Objected to as improper rebuttal. This witness was on the stand and all this was gone into.

Mr. Cluck: On that, your Honor, I think the answer is that this is a matter that could be gone into on cross-examination in part, but certainly more appropriately on rebuttal, because it relates to the same matters we have covered by other witnesses, namely, the possible alternative causes of the accident and the actual mechanics of the aircraft related to it.

The Court: How many more witnesses are you likely to have that will raise the question of whether it is proper rebuttal?

Mr. Cluck: This is the only one.

The Court: Read the question. [381]

(Last question read by reporter.)

The Court: The objection is overruled. You may answer.

(Testimony of Lawrence Strong.)

A. It would take effect as soon as the aircraft reached a speed that would allow the tail surfaces to start correcting.

Q. Just say in a word why that is so.

A. When the aircraft is moving at a slow speed, there is very little control, and as it gains speed, the control surfaces become more sensitive and have more effect.

Q. Do you know the approximate distance down the runway when that effective control takes place?

A. It would be strictly dependent upon speed and headwind.

Q. Assuming the automatic pilot operating, it directs the course of the plane right and left in conformity with directional settings, is that true?

A. Right.

Q. What course it would take with reference to the runway would depend upon what that setting was? A. Right.

Q. Previously you had spoken of two instruments having the same setting, the auto gyro and the auto pilot and the directional gyro. What is the probability, just as a matter of chance, of those two settings being the same?

Mr. Matthews: Objected to as no qualification shown by this witness, improper rebuttal, and a matter that was [382] inquired into. The witness was before the Court and counsel had an opportunity to examine him on these matters, and he should not go into a new field, a new subject, as

(Testimony of Lawrence Strong.)

the very last witness at the very conclusion of the case.

The Court: Read the question.

(Last question read by reporter.)

Mr. Matthews: The witness' answer calls for speculation.

Mr. Cluck: If he knows.

The Court: The objection is overruled, with that condition.

A. May I have the question again, please?

(Last question read by reporter.)

A. The probability would be very remote.

Mr. Cluck: That is all. Call Mr. Mugge.

The Court: Mr. Mugge has been previously sworn. He may now take the stand.

LOUIS MUGGE

recalled as a witness by and on behalf of plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cluck: [383]

Q. The questions which I am about to ask you I would like to have you answer from your direct personal knowledge without referring to anything in any other proceeding or hearing. You examined, I think you testified, the tracks made by the aircraft involved in this accident, did you not?

A. That's right.

(Testimony of Louis Mugge.)

Q. Would you tell the Court briefly what tracks you observed on the runway made by this aircraft?

Mr. Matthews: May I ask one or two qualifying questions going to the admissibility of this witness' testimony?

The Court: Have you asked all the qualifying questions you wish to, Mr. Cluck?

Mr. Cluck: Yes, I had previously asked them, your Honor. If there is any new point the Court indicates it wishes us to go into, we shall.

The Court: You may inquire, Mr. Matthews.

Mr. Matthews: Were you a member of the committee designated by the CAB to investigate the tracks that were made by this airplane?

The Witness: I was a member of a joint committee made up of members of the Civil Aeronautics Board and the Civil Aeronautics Administration to investigate the accident.

Mr. Matthews: Were Mr. Leon D. Cuddeback, Mr. Glen, [384] Mr. Cook, and Mr. Lyle Lucklichtner also on that committee with you?

The Witness: Yes, sir, that's right.

Mr. Matthews: Did you make a formal report to the CAB of your findings, which you signed?

The Witness: Yes, we did.

Mr. Matthews: Was that report read to you yesterday here at the courthouse?

The Witness: Not in its entirety, no.

Mr. Matthews: Was part of it read to you?

The Witness: Yes.

Mr. Matthews: Was the purpose of reading that

(Testimony of Louis Mugge.)

to you to refresh your recollection as to the distances?

The Witness: That's right. I assisted Mr. Moore in drawing a map of the field and there seemed to be some confusion as to the figures.

Mr. Matthews: Would you have an independent recollection after the lapse of some year and a half of the various distances and angles and curvatures without reference to that report?

The Witness: I think fairly accurately; there may be some error. As far as general figures are concerned, I think I remember them.

Mr. Matthews: That is all.

Q. (By Mr. Cluck): Will you briefly describe the tracks [385] as you observed them on the runway?

A. Yes. As I recall, the tracks were picked up from the end of the runway to a point about 1,000 feet down the runway in a comparatively straight line. From that point, they assumed a gentle curve towards the east side of the runway, or the lefthand side, leaving the runway at a point, if I remember right, about 1,800 feet from the end of the runway.

Q. Without reference to detail, Mr. Mugge, the tracks described a gentle curve, did they, to the left of the runway, is that correct?

A. Will you say that again?

Q. I say without going into a lot of detail, the tracks, did they describe a curve to the left prior to leaving the runway?

A. That is right.

(Testimony of Louis Mugge.)

Q. Do you recall the approximate degree of curvature?

A. No, I don't; from a point about 1,000 feet down the runway in the center to a point about 1,800 feet on the left edge from the end of the runway.

Q. It was right at the left edge of the runway that the aircraft—that you lost the tracks?

Mr. Matthews: I think that is very leading.

The Court: Sustained.

The Witness: I don't know that the—— [386]

The Court: Just a moment. Ask him another question.

Q. What did you observe at the left edge of the runway at the end of the curve you have just described?

A. I don't recall that the track actually went to the end of the edge of the runway. My memory isn't that good, but it seems to me there was a one-wheel track. Whether it was intermittent or solid, I don't quite recall at this time.

Q. The plane finally crashed into what?

A. Into the revetment hangar on Boeing Field.

Q. Where is that located with reference to the runway we spoke about?

A. That is to the east side of the runway.

Q. That would be to the left as you go south, is that correct?

A. To the left, yes.

Q. Do you know approximately how far south that hangar is from the north end of the field?

A. No, I don't. I would say it is maybe two-thirds of the way down the runway.

(Testimony of Louis Mugge.)

Q. How long is the runway?

A. The usable portion is 7,500 feet, if I remember right.

Q. Approximately how far to the east of the runway is the hangar located?

A. That I do not know.

Mr. Cluck: That is all. [387]

The Court: May I ask you how much distance, approximately, as you recall it, do you think the plane tracks traversed from that approximate 1,000-foot point to the place where you said you saw no further evidence of the tracks?

The Witness: Are you referring to the runway itself, your Honor?

The Court: I am talking about that curved line that you saw. I understood you to say—these are not your words—I understood you, in substance, to say that the tracks started from, you meant, the north end of the runway, did you not?

The Witness: Yes, sir.

The Court: And they continued to a point about 1,000 feet to the southward and there you observed the beginning, or near that point, is that what you said, that you observed the beginning of a curved line?

The Witness: Yes, sir.

The Court: For what distance were you able, and did you, if you did, trace that curved line before it disappeared?

The Witness: It was about 800 feet more down

(Testimony of Louis Mugge.)

the runway, which would give a total of 1,800 feet from the end, of the north end of the runway.

Mr. Cluck: That is all. [388]

Mr. Matthews: That is all.

The Court: You may step down. The Court wishes to commend Mr. Mugge for his success in getting here.

Mr. Cluck: The plaintiff rests, your Honor.

The Court: I was wondering if the witness Cook, in view of the fact that he was not consulted about the striking of his testimony, if he wished an opportunity to make any statements regarding the accuracy of his testimony. The record was made without his being consulted that his testimony was inaccurate and that may or may not be fair to him. I do not know whether he considers it so or not. Does he wish to make a statement? If so, Mr. Cook, you may come forward. I think in fairness to the witness, since he was not consulted, at least in open court he should be given that opportunity.

Witness Cook: It has been a year and a half since I saw those tracks, and I have not even been near Boeing Field, I might say, since then. I didn't in any way consult the statement that I had made before, and to the best of my knowledge, as I remembered it, those tracks were visible. However, it is quite possible that they weren't, as Mr. Mugge stated. He said they were picked up about 1,050 feet, so that is probably correct.

The Court: Does anyone else wish to ask a question that would bring out any other detail that he

might wish [389] brought out, or which you wish him to have the opportunity of bringing out?

Mr. Cluck: Did I consult you at all about this matter prior to your testifying?

Witness Cook: None whatsoever.

Mr. Cluck: Did I suggest you read the report concerning what you had testified previously?

Witness Cook: No, sir.

Mr. Cluck: Or give you any opportunity to refresh your recollection?

Witness Cook: No, sir.

Mr. Cluck: You just did the best you could from your memory?

The Witness: That is right. I gave it as I remembered it.

Mr. Cluck: And you think you made a mistake?

The Witness: Perhaps I did.

The Court: Is there anything else? The witness is excused.

As I understand it, plaintiffs rest.

Mr. Cluck: That is correct.

The Court: Do the defendants likewise rest?

Mr. Matthews: No rebuttal.

The Court: How much time do you gentlemen wish to argue this tomorrow morning? [390]

Mr. Cluck: Your Honor, extensive briefs have been submitted by both sides, and I think this is one of those cases where in the long run it would save time to have a fair amount of time for oral argument. Our suggestion is that the morning be equally divided between both sides. If we can finish sooner than that, of course, we would like to do so,

but I think there are quite a number of points here that should require attention before the argument is over.

Mr. Matthews: I do not know what the Court's calendar is like. I made the statement to the Court we would finish in three days, and I think the Court has heard all of the testimony and had briefs and reply briefs from both parties. We would be willing to submit the matter to the Court or to abide by such time for argument as the Court may designate.

The Court: I prefer to hear oral argument, and I will do that tomorrow morning. If each side would be satisfied with 45 minutes, I might begin the argument at one hour in the forenoon. If a different time is desired, the Court might begin at another time in the forenoon.

Mr. Cluck: We feel, your Honor—we discussed it, we are just expressing our belief and opinion—that it would be better to have more time than that. We think it would be helpful all the way [391] around.

The Court: The Court will extend to each side one hour's time for argument, and we will begin the arguments at 9:30 tomorrow morning and we will finish them not later than 11:30. There will be some time out for a recess. I wish to be finished with the arguments about that time, so each side may have approximately an hour. Do you think in this case you as the plaintiff ought to have the opening and closing?

Mr. Cluck: We submit that is the case, your Honor.

The Court: Is there any objection?

Mr. Matthews: If they have the burden of proof, which I think they have, they should have the opening and closing.

The Court: Then you have no objection?

Mr. Matthews: If we have the burden of proof, I think that matter should be passed on.

Mr. Houghton: We feel all we have the burden of proof on is to prove the conditions of the establishment of the valid contract of insurance. We naturally had that burden, of course.

The Court: The plaintiffs in this case are suing on a policy. The defendants are defending against liability. The plaintiffs will have the opening and closing arguments and the defendants may have the argument in between. Plaintiffs may divide their hour's [392] time in such portions as they may wish as between the opening and closing arguments. How many counsel desire to speak for each side of the litigation?

Mr. Dennis: I waive my argument, your Honor.

The Court: Do both Mr. Cluck and Mr. Houghton wish to argue?

Mr. Cluck: I think we probably will.

The Court: Let one make the opening and the other the closing argument. What about the defendants' argument? Is more than one counsel desirous of participating?

Mr. Matthews: Mr. Wilkerson and I both will make arguments.

The Court: You may divide your arguments as between the two of you in such portion as you wish.

I ask counsel about the briefs. I have a trial brief from each side. Then I have what are denominated Plaintiffs' Supplemental Brief, filed today, and a brief signed by Macbride, Matthews & Hanify, entitled Supplemental Memorandum of Proof of Negligence by Circumstantial Evidence. Are those all of the briefs made that relate to the merits of the case?

Mr. Wilkerson: Those are all of our briefs, your Honor.

Mr. Houghton: You have two from us, your Honor.

The Court: You filed a trial brief, Plaintiffs' Memorandum of Points and Authorities, filed on the 11th, [393] and the plaintiffs filed a supplemental brief on today's date. Are those two the only briefs you filed?

Mr. Houghton: That is right, your Honor.

The Court: As to the defendants, you have filed two briefs during the trial. One was filed yesterday, called Trial Brief, and you have filed one today called Supplemental Memorandum of Proof of Negligence by Circumstantial Evidence.

Mr. Wilkerson: Those are all the briefs, your Honor.

The Court: In those briefs, have counsel for both sides discussed these legal questions about the waiver and consent? Have you authorities cited upon those points?

Mr. Houghton: I think we have, your Honor. I think we took up each point systematically and attempted to cover it.

The Court: We will begin the argument at 9:30 tomorrow morning. Court is adjourned until that time. The witnesses are all excused.

Mr. Matthews: Could I impose on the Court to ask a very important question?

Mr. Houghton: We have no objection.

The Court: Court is again in session. Defendants' case in chief is now opened up for this purpose.

Mr. Matthews: Mr. John O. Vineyard. [394]

The Court: Mr. Vineyard has been previously sworn. He is now recalled for further examination.

JOHN VINEYARD

recalled as a witness by and on behalf of defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Matthews:

Q. You heard the testimony that was given by——

The Court: Is this surrebuttal intended?

Mr. Matthews: Yes.

The Court: That is so regarded, instead of as the Court previously stated.

Q. You heard the testimony that was given by Mr. Strong concerning the automatic pilot and the time at which it would take hold and the way it would affect the airplane? A. I did.

Q. Will you please state whether or not you agree with that testimony?

(Testimony of John Vineyard.)

A. No, sir, I do not, altogether.

Q. Will you state to the Court your belief as to that matter, your opinion?

A. In my belief, I believe that as soon as the power was applied and enough pressure built up on the system and [395] the airplane started to move, it would start veering off in the direction at which the automatic pilot was set.

Q. If the automatic pilot had been set for an instrument takeoff at the north end of the runway, I will ask you if you would have expected it to have veered off before it had traveled the distance that was referred to here in the testimony?

A. That is my belief. I believe it would, yes, sir. I believe it would have started to turn before it went 1,800, 2,000 feet. It would have started a good deal before that, because the pressure in the system would have built up and there would have been enough pressure on the controls of the airplane that would have caused it to turn off, I would say, at approximately 500 feet, start veering off in the direction in which it was set if it were on.

Mr. Matthews: That is all.

Cross-Examination

By Mr. Cluck:

Q. You said it would take about 500 feet for the air flow to make your rudder surfaces effective, is that right?

A. That is true. That would be one thing, and the pressure built up in the system.

(Testimony of John Vineyard.)

Q. How many more feet would it be before the tail would rise, before the rear end of the plane would rise?

A. It would depend on the pressure put on the wheel. [396] If it was just the automatic pilot alone was flying, it would probably rise at the same time it would take effect. It would start rising the same time the airplane or the automatic pilot—at the same time it would take effect or take hold of the airplane, it would start raising the tail, more than likely, if it is trimmed in a nose-lowered condition. If it was trimmed in a tail-lowered condition, it would probably run for 3,000 feet before the tail would ever rise.

Q. Ordinarily the rear portion, the tail of your airplane, would rise sometime after the airflow makes your rudder surfaces really effective in your runway takeoff, isn't that right?

A. That is a hydraulic control automatic pilot, and you have to have pressure in the system before it will even function.

Q. I am not speaking of that. I am speaking of the rising of the tail surfaces.

A. It has to be trimmed. The airplane has to be trimmed in a certain attitude for the pilot to take off.

Q. Irrespective of the pilot, about what time during the course of a normal takeoff on the runway does the rear surface of the airplane rise?

A. You are talking about a normal takeoff?

Q. I am talking about a normal takeoff.

(Testimony of John Vineyard.)

A. On a normal takeoff, probably 2,000 [397] feet.

Q. Whether this automatic pilot would cause the airplane to veer one way or the other in the early portion of the takeoff might depend upon whether your tail wheel was locked or unlocked, wouldn't it?

A. That might have some effect on the automatic pilot.

Q. If your tail wheel was locked, then your automatic pilot wouldn't cause the plane to turn until the rear surface of the airplane rose off the ground?

A. That is possible, yes, sir.

Mr. Cluck: That is all.

Redirect Examination

By Mr. Matthews:

Q. You have been here all during the trial?

A. Yes, sir.

Q. You have heard all of the testimony?

A. Yes, sir.

Q. State whether or not, in your opinion, the crash of this airplane was caused by the automatic pilot taking hold?

A. In my opinion, it was not.

Mr. Matthews: That is all.

Recross-Examination

By Mr. Cluck:

Q. From your knowledge of aircraft, you wouldn't want to undertake to say definitely what caused this or any other crash? [398]

(Testimony of John Vineyard.)

A. As I stated yesterday, there was a factor of things that caused it.

Q. The three things you mentioned?

A. Yes, sir.

Q. You don't enlarge upon the testimony that you gave yesterday in that respect?

A. No, sir.

Mr. Cluck: That is all.

Mr. Matthews: The three things, in your opinion, that contributed to this accident were what?

The Witness: Would be ice, would be overload, and pilot proficiency.

Mr. Matthews: What do you mean by pilot proficiency?

Mr. Cluck: If your Honor please, we had no objection at all to surrebuttal. What counsel now is doing is to go back over the same three things that were covered in both direct and cross-examination. We left the matter of the automatic pilot and anything else, apparently, and are going over the same ground covered yesterday.

Mr. Matthews: I don't think the witness ever did explain what he means by pilot proficiency.

The Court: The objection is overruled. This subject was gone into by questions of Mr. Cluck. Be as brief as you can.

The Witness: Take first icing [399] conditions——

The Court: I think he wants to know not about icing conditions; he wants to know what you meant by your use of the term pilot proficiency.

(Testimony of John Vineyard.)

The Witness: I would have to go into the other terms to prove that it could have been caused by any one of the three or the three combined.

Mr. Cluck: I object to that, your Honor. The witness should answer the question if he can.

The Court: I think so. If he cannot answer it, then he cannot. All he wants you to do is to explain what you mean by your use of the term pilot proficiency.

Mr. Matthews: Let me ask you if I understand you correctly. You mean that when an airplane gets into trouble, that some pilots are better able to get it out of trouble than others?

The Witness: That is correct, yes, sir. It is the skill of a pilot handling an airplane, is pilot proficiency. Some have the proficiency, some don't have, and time and practice and schooling and everything else builds up a pilot's proficiency.

Mr. Matthews: Of these three things, which one do you think got the airplane in trouble in the first instance?

The Witness: It has always been my opinion that the icing conditions on the airplane did.

Mr. Matthews: By pilot proficiency, you mean some [400] pilots, an expert pilot, might have been able to get it out of that trouble?

The Witness: That is correct, yes, sir.

Mr. Matthews: That is all.

Mr. Cluck: That is all.

The Court: Do both sides rest?

Mr. Cluck: Yes, your Honor.

Mr. Matthews: Yes, your Honor.

The Court: You are excused until tomorrow morning.

(At 5:08 o'clock p.m. Thursday, October 12, 1950, proceedings adjourned until 9:30 o'clock a.m. Friday, October 13, 1950.)

October 13, 1950, 9:30 A.M.

The Court: I will hear counsel in argument from their present stations.

Mr. Dennis: May I be excused, your Honor?

The Court: You desire to be excused and rest the Government's argument upon that made by other counsel for plaintiffs?

Mr. Dennis: Yes, your Honor.

The Court: Is there any objection? That request is granted. We will now hear plaintiffs' opening argument. [401]

(Arguments made by counsel for plaintiffs
and counsel for defendants.)

The Court: I would like very much to be able at this time to appropriately announce the Court's decision, but not feeling it appropriate to do so by reason of certain factors which I need to check more carefully than the time and opportunity have up to this time afforded me, I have to take some additional time to study this record. That necessitates the Court's taking this case under advisement.

I will have to assure counsel that in addition to being regretted by me, it affords occasion for some regret on the part of counsel because I cannot tell

when I will be able to announce a decision in this case in view of other pressing matters needing the Court's attention before this. I can only say that I will do the best I can. I am sorry that my work is such that I cannot allow counsel the reasonable hope that this can be disposed of immediately.

The case is taken under advisement.

(At 11:55 o'clock a.m. Friday, October 13, 1950, trial proceedings concluded.) [402]

Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

Receipt of copy acknowledged.

[Endorsed]: Filed August 29, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted, together with Plaintiff's Exhibits numbered 1 to 10, inclusive, and defendants' Exhibits A-1 to A-6, inclusive, and A-8 to A-14, inclusive, constitute the record on appeal herein from the Judgment entered July 24, 1951, dismissing the action, to the United States Court of Appeals for the Ninth Circuit, and are identified as follows:

1. Complaint, filed Oct. 19, 1949.
2. Praecipe for Summons, filed Oct. 19, 1949.
3. Summons with Marshal's Return thereon, filed Oct. 21, 1949.
4. Notice of Appearance of Defendants, filed Nov. 10, 1949.
5. Answer of Defendants, filed Nov. 29, 1949.
6. Reply, filed Mar. 2, 1950.

7. Motion Plaintiffs to File Demand for Jury, filed May 4, 1950.

8. Note for Motion calendar on above motion, filed May 4, 1950.

9. Statement of Defendants' Reasons in Opposition to the Motion of Plaintiff for Permission to File Demand for Jury, filed May 5, 1950. (Defts'. Memo. in Opposition to Demand for Jury attached.)

10. Plaintiffs' Memorandum in Support of Motion for Permission to File Demand for Jury or Order for Trial by Jury, filed May 8, 1950.

11. Request for Admission Under Rule 36 by defendants, filed Sept. 8, 1950.

12. Praeipe for Subpoena, James Smith, with Marshal's Return, filed 9-12-50.

13. Motion to File Amended Complaint, filed Sept. 12, 1950.

14. Note for Motion Calendar, filed Sept. 12, 1950.

15. Marshal's Return on Subpoena, Schaak, filed 9-14-50.

16. Marshal's Return on Subpoena, Roderick, filed Sept. 14, 1950.

17. Marshal's Return on Subpoena, Kendall, filed Sept. 14, 1950.

18. Marshal's Return on Subpoena, Cole, filed Sept. 14, 1950.

19. Notice to Take Depositions Upon Oral Examination, filed Sept. 15, 1950.

20. Notice to Take Deposition of George M. Cole, filed Sept. 18, 1950.

21. Amended Complaint, filed Sept. 18, 1950.

21a. Affidavit of R. V. Houghton, filed Sept. 18, 1950.

22. Order Granting Leave to File Amended Complaint, filed Sept. 18, 1950.

23. Plaintiffs' Answer to Defendants' Request for Admission Under Rule 36, filed Sept. 18, 1950.

24. Marshal's Returns on subpoenas, Don Lynch, et al., filed Sept. 27, 1950.

25. Affidavit of Philip G. Kapleau, filed Oct. 5, 1950.

26. Marshal's Return on Subpoenas, Miner, et al., filed Oct. 6, 1950.

27. Affidavit of Service of Ward L. Sax re Notice to Take Deposition of George M. Cole, filed Oct. 6, 1950.

28. Marshal's Return on subpoenas, Strong, et al., filed Oct. 6, 1950.

29. Depositions of John Kendall, Jr., George M. Cole, Donald F. Lynch, James W. Smith, Charles S. Belknap, filed Oct. 9, 1950.

30. Affidavit of Service of Notice to Take Depositions upon Oral Examination, filed Oct. 9, 1950.

31. Marshal's Return on subpoena, Jandl, filed Oct. 10, 1950.

32. Marshal's Return on subpoena, Fennell, filed Oct. 10, 1950.

33. Marshal's Return on Subpoena, Davison, filed Oct. 10, 1950.

33a. Stipulation re documents admissible in evidence, filed Oct. 10, 1950.

34. Stipulation re names of passengers on board aircraft, filed 10-11-50.

35. Plaintiffs' memorandum of Points and Authorities, filed Oct. 11, 1950.

36. Trial Brief of Defendants, filed Oct. 11, 1950.

37. Supplemental Memorandum on Proof of Negligence by Circumstantial Evidence, filed Oct. 12, 1950.

38. Plaintiffs' Supplemental Brief, filed Oct. 12, 1950.

39. Court's Opinion, filed July 13, 1951.

40. Court Reporter's Transcript of excerpt from record re allegations of paragraph IV, filed July 18, 1951.

41. Clerk's record of trial, Oct. 10, 1950, et seq., filed July 13, 1951.

42. Findings of Fact and Conclusions of Law, filed July 23, 1951.

43. Judgment, filed July 23, 1951, entered in Civil Docket July 24, 1951.

44. Notice of Appeal, filed August 23, 1951.

45. Bond for Costs on Appeal, filed August 23, 1951. (Am. Surety Company of New York—\$250.00.)

46. Court Reporter's Transcript of Proceedings at Trial, filed Aug. 29, 1951.

47. Designation of Contents of Record on Appeal, filed Aug. 29, 1951.

48. Defendants' and Appellees' Designation of Additional Matter for Record, filed Sept. 7, 1951.

49. Court Reporter's Transcript of proceedings on Introduction of Exhibits in Opening Statement, and Proceedings at Time of Entering Findings of

Fact, Conclusions of Law and Judgment, filed Sept. 7, 1951.

50. Stipulation transmitting original exhibits, filed Sept. 25, 1951.

51. Order Directing Transmittal of original Exhibits, filed Sept. 25, 1951.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of plaintiffs, to wit: Filing fee, notice of Appeal, \$5.00, which amount has been paid to me by the attorneys for appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 26th day of September, 1951.

[Seal]

MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13122. United States Court of Appeals for the Ninth Circuit. United States of America, R. P. Jandl, as Administrator of the Estate of William F. Leland, Deceased, and C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines, Appellants, vs. Eagle Star Insurance Company, Limited; Orion Insurance Company, Limited; The Drake Insurance Company, Limited, subscribing underwriting members of Lloyd's, London, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 3, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13122

THE UNITED STATES OF AMERICA and
R. P. JANDL, as Administrator of the Estate
of William F. Leland, Deceased,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY,
LIMITED; ORION INSURANCE COM-
PANY, LIMITED; THE DRAKE INSUR-
ANCE COMPANY, LIMITED, Subscribing
Underwriting Members of Lloyd's, London.

Appellees.

APPELLANTS' STATEMENT OF POINTS ON
WHICH THEY INTEND TO RELY ON
APPEAL

Pursuant to subdivision 6 of Rule 19 of the above-named court, appellants state that the points on which they intend to rely on this appeal are:

1. It being admitted that the policy attached as a binding contract, that the premiums were paid and that the loss occurred, the insurers had the burden of proving, strictly and by a preponderance of the evidence, any facts which would entitle them to forfeit the policy or defeat a recovery. They failed to sustain that burden.

2. The evidence does not justify the trial court's

finding that the assured, William F. Leland, acted negligently, carelessly and recklessly in causing the acting pilot of the insured aircraft to attempt to take off in flight under the existing conditions nor his finding that the damage to the aircraft and the revetment hangar was proximately caused by such negligence.

3. Even if the assured was guilty of negligence which proximately caused the loss or damage, such negligence did not violate the terms of the insurance policy nor justify the holding that plaintiffs are not entitled to recover against the insurers for loss or damage to the insured aircraft.

4. Such negligence, even if proved, would not relieve the insurers from their obligation under Section 2 of the policy to indemnify the insured against the judgment obtained by King County for damage to its revetment hangar, nor from their duty, under the same section, to defend the suit brought by King County.

5. Paragraph 3 of the General Conditions of the policy, quoted on page 2 of the trial court's opinion, should be construed to be a condition pertaining to the care and preservation of the insured property in the event of an accident, not a covenant against negligence in the operation of the aircraft. There is nothing in that paragraph or elsewhere in the policy to take the policy out of the general rule that the law requires the insurer to assume the risk of negligence of the insured and permits recovery

even though the negligence of the insured caused the loss.

6. Section 1-A of the policy insures against accidental damage caused by frost. "Frost," as used here, means freezing. If the trial court's Findings of Fact, and particularly Paragraphs IX and X thereof, are correct, the loss sued for resulted from an accident caused by freezing, which was a hazard expressly insured against.

7. The court erred in sustaining appellees' objections to the offers of proof recorded on pages 343 to 347, inclusive, of the court reporter's Transcript of Proceedings at Trial, which is page (or item) No. 46 of the original certified record.

/s/ JACK R. CLUCK,

/s/ ROLLA V. HOUGHTON, of

HOUGHTON, CLUCK, COUGHLIN & HENRY,

Attorneys for Appellant R. P. Jandl, as Administrator of the Estate of William F. Leland, Deceased, and Appellant C. W. Breakiron, Successor Receiver for Atlantic and Pacific Airlines.

/s/ J. CHARLES DENNIS,

United States Attorney, for Appellant United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed October 10, 1951.

